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ALEXANDER L. STEVENS
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IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

ADAN LOPEZ-MENDOZA and ELIAS SANDOVAL-SANCHEZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Should application of the exclusionary rule in deportation proceedings be abandoned even though its deterrent effect is substantial, it has long been applied in this context without excessive social costs, and the government has not demonstrated that realistic or viable alternatives exist which would adequately safeguard against the wholesale violation of the Fourth Amendment rights of discrete racial and ethnic minorities?

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
STATEMENT OF THE CASE.....	1
INTRODUCTION AND SUMMARY	
OF ARGUMENT.....	16
ARGUMENT:	
I. THE COURT BELOW CORRECTLY APPLIED THE EXCLUSIONARY RULE IN DEPORTATION PROCEEDINGS.....	28
A. Application of the Exclusionary Rule in Deportation Proceedings Provides Substantial, Efficient, and Necessary Deterrence of Unconstitutional INS Conduct.....	32
1. Deportation Falls Within The Offending Officers' "Zone of Primary Interest".....	38
2. The Alternatives To The Exclusionary Rule Proposed By INS Are Neither Realistic Nor Viable Substitutes, and Would Not Effectively Protect Fourth Amendment Rights.....	46
B. Application of The Exclusionary Rule Will Not Unduly Impede INS Enforcement Efforts, As Illustrated By The Past And Present Practice of Suppressing Tainted Evidence in Deportation Proceedings.....	64
1. The Exclusionary Rule's Application In Deportation Proceedings.....	65

2. The Practical Effect of Suppression Motions On Current INS Enforcement.....	79
C. The Social Cost of Abandoning The Rule Would Be Excessive, Leading To Wholesale Violations Of The Fourth Amendment Rights Of Discrete Racial And Ethnic Minorities.....	90
II. THE INS VIOLATED THE FOURTH AMENDMENT IN THIS CASE.....	100
CONCLUSION.....	109

TABLE OF AUTHORITIES

	Page
<u>Cases:</u>	
<u>Almeida-Sanchez v. United States</u> 413 U.S. 266 (1973).....	18, 31, 99
<u>Au Yi Lau v. INS</u> , 445 F.2d 217 (D.C. Cir.), <u>cert. denied</u> , 404 U.S. 864 (1971).....	103
<u>Babula v. INS</u> , 665 F.2d 293 (3d Cir. 1981)5.....	78, 80
<u>Benitez-Mendez v. INS</u> , 707 F.2d 1107 (9th Cir. 1983).....	103
<u>Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics</u> , 403 U.S. 388 (1971).....	51-54
<u>Blum v. Stenson</u> , ---U.S. ---, No. 81-1374, slip op. (March 21, 1984).....	101, 107
<u>Bong Youn Choy v. Barber</u> , 279 F.2d 642 (9th Cir. 1960).....	86
<u>Boyd v. United States</u> , 116 U.S. 616 (1886).....	33
<u>Bridges v. Wixon</u> , 326 U.S. 135 (1945).....	37, 85
<u>Brown v. Illinois</u> , 422 U.S. 590 (1975).....	77, 80, 103, 104
<u>Brown v. Texas</u> , 443 U.S. 47 (1979).....	26, 108
<u>Cabral-Avila v. INS</u> , 589 F.2d	

957 (9th Cir. 1978), cert. denied, 440 U.S. 920 (1979).....	104
<u>Carlson v. Green</u> , 446 U.S. 14 (1980).....	53
<u>Carnejo-Molina v. INS</u> , 649 F.2d 1145 (5th Cir. 1981).....	78, 80
<u>Chavez-Raya v. INS</u> , 519 F.2d 397 (7th Cir. 1975).....	77
<u>City of Los Angeles v. Lyons</u> --- U.S. ---, 75 L.Ed 2d 675, 103 S.Ct. 1660 (1983).....	23, 49
<u>Corona-Palomera v. INS</u> , 661 F.2d 814 (9th Cir. 1981).....	84
<u>Davis v. Mississippi</u> , 394 U.S. 721 (1969).....	29, 103
<u>Delaware v. Prouse</u> , 440 U.S. 648 (1979).....	26, 27, 36, 108
<u>Donovan v. Sarasota Concrete Company</u> , 693 F.2d 1061 (11th Cir. 1982).....	43
<u>Dunaway v. New York</u> , 442 U.S. 200 (1979).....	27, 102
<u>Elkins v. United States</u> , 364 U.S. 206 (1960).....	33, 35, 61
<u>Ex parte Jackson</u> , 263 F.110, (D. Mont.), <u>appeal dismissed</u> <u>sub nom. Andrews v. Jackson</u> , 267 F.1022 (9th Cir. 1920).....	76-77

<u>Fong Haw Tan v. Phelan</u> , 333 U.S. 6 (1948).....	42
<u>Gastelum-Quinones v. Kennedy</u> , 374 U.S. 469 (1963).....	84
<u>Gonzalez v. City of Peoria</u> , 722 F.2d 468 (9th Cir. 1983).....	52
<u>Gouled v. United States</u> , 255 U.S. 298 (1921).....	75
<u>Harlow v. Fitzgerald</u> , 457 U.S. 800 (1983).....	52
<u>Huerta-Cabrera v. INS</u> , 466 F.2d 759 (7th Cir. 1972).....	78-80
<u>Illinois v. Gates</u> , --- U.S. ---, 76 L.Ed.2d 527 (1983).....	101
<u>Illinois Migrant Council v. Pilliod</u> , 398 F.Supp. 882 (N.D. Ill. 1975), aff'd, 540 F.2d 1062 (7th Cir.), modified on rehearing en banc, 548 F.2d 715 (1977).....	30, 50, 59
<u>In re Guevara-Benitez</u> , A 22 552 166 (April 24, 1980).....	72
<u>In re Ramira-Cordova</u> , A 21 095 059 (February 21, 1980).....	71
<u>International Ladies Garment Workers Union v. Sureck</u> , 681 F.2d 624 (9th Cir. 1982), cert. granted sub nom. <u>INS v. Delgado</u> --- U.S. ---, 76 L.Ed.2d 805, 103	

S.Ct. 1872 (1983).....	30, 50, 103, 107
<u>Iowa v. Union Asphalt & Roadoils, Inc.,</u> 281 F. Supp. 391 (S.D. Iowa 1968), aff'd sub nom., Standard Oil Co. <u>v. Iowa</u> , 408 F.2d 1171 (8th Cir. 1969).....	43
<u>Iran v. INS</u> , 656 F.2d 469 (9th Cir. 1981).....	84
<u>Irvine v. California</u> , 347 U.S. 128 (1954).....	62-63
<u>Jordan v. DeGeorge</u> , 341 U.S. 223 (1951).....	42
<u>Katris v. INS</u> , 562 F.2d 866 (2d Cir. 1977).....	80, 84
<u>Klissas v. INS</u> , 361 F.2d 529 (D.C. Cir. 1966).....	78
<u>Knoll Associates, Inc. v. FTC</u> , 397 F.2d 530 (7th Cir. 1968).....	43
<u>LaDuke v. Nelson</u> , 560 F. Supp. 158 (E.D. Wash. 1982).....	30, 50
<u>LaFranca v. INS</u> , 413 F.2d 686 (2d Cir. 1969).....	103
<u>Lopez-Mendoza and Sandoval-Sanchez</u> <u>v. INS</u> , 705 F.2d 1059 (9th Cir. 1983).....	76
<u>Mapp v. Ohio</u> , 367 U.S. 643 (1961).....	45, 48
<u>Marcello v. Bonds</u> , 349 U.S. 302 (1955).....	42

<u>Marquez v. Kiley</u> ,, 436 F. Supp. 100 (S.D.N.Y. 1977).....	30, 50, 52, 95
<u>Marshall v. Barlow's, Inc.</u> , 436 U.S. 307 (1978).....	36
<u>Matter of Au, Yim, and Lam</u> , 13 I. & N. Dec. 294 (BIA 1969), <u>aff'd, sub nom.</u> <u>Au Yi Lau v. INS</u> , 445 F.2d 217 (D.C. Cir. 1971), <u>cert. denied</u> , 404 U.S. 864 (1971).....	67-68
<u>Matter of Bulos</u> , 15 I. & N. Dec. 645 (BIA 1976).....	69
<u>Matter of Burgos</u> , 15 I. & N. Dec. 278 (BIA 1975).....	67
<u>Matter of Cachiguango and Torres</u> , 16 I. & N. Dec. 205 (BIA 1977).....	67
<u>Matter of Castro</u> , 16 I. & N. Dec. 81 (BIA 1976).....	69
<u>Matter of Chen</u> , 12 I. & N. Dec. 603 (BIA 1968).....	68
<u>Matter of Cheung</u> , 13 I. & N. Dec. 794 (BIA 1971).....	69
<u>Matter of D M</u> , 6 I. & N. Dec. 726, (BIA 1955).....	68
<u>Matter of Davila</u> , 15 I. & N. Dec. 781 (BIA 1976).....	69
<u>Matter of Doo</u> , 13 I. & N. Dec. 30 (BIA 1968).....	68
<u>Matter of Escobar</u> , 16 I. & N.	

Dec. 52 (BIA 1976)	69
<u>Matter of Garcia, 17 I. & N.</u> Dec. 319 (BIA 1980).....	73
<u>Matter of Garcia-Flores, 17 I. & N.</u> Dec. 325 (BIA 1980).....	73
<u>Matter of King and Yang, 16 I. & N.</u> Dec. 502 (BIA 1978).....	67
<u>Matter of Mejia, 16 I. & N.</u> Dec. 6 (BIA 1976).....	67
<u>Matter of Perez-Lopez, 14 I. & N.</u> Dec. 79 (BIA 1972).....	68
<u>Matter of Methure, 13 I. & N.</u> Dec. 522 (BIA 1970).....	67, 69
<u>Matter of Rojas, 15 I. & N.</u> Dec. 492 (BIA 1975).....	69
<u>Matter of Sandoval, 17 I. & N.</u> Dec. 70 (BIA 1979).....	passim
<u>Matter of Scavo, 14 I. & N.</u> Dec. 326 (BIA 1973).....	67
<u>Matter of Taerghodsi, 16 I. & N.</u> Dec. 260 (BIA 1977), <u>aff'd, Taerghodsi</u> <u>v. INS, 569 F.2d 1154 (5th Cir.1978),</u> <u>cert. denied, 439 U.S. 829</u> (1978).....	69
<u>Matter of T, 9 I. & N.</u> Dec. 646 (BIA 1962).....	69
<u>Matter of Tang, 13 I. & N.</u> Dec. 691 (BIA 1971).....	67
<u>Matter of Toro, 17 I. & N.</u> Dec. 340	

<u>(BIA 1980)</u>	66, 72
<u>Matter of Tsang, 14 I. & N. Dec. 294</u> <u>(BIA 1973)</u>	67
<u>Matter of Wong, 13 I. & N. Dec. 820</u> <u>(BIA 1971)</u>	67
<u>Matter of Wong and Chan, 13 I. & N.</u> <u>Dec. 141 (BIA 1969), aff'd sub nom.</u> <u>Tit Tit Wong v. INS, 445 F.2d 217</u> <u>(D.C. Cir. 1971), cert. denied,</u> <u>404 U.S. 864 (1971)</u>	68, 69
<u>Matter of Yam, 12 I. & N. Dec. 676</u> <u>(BIA 1968), aff'd, Yam Sang Kwai</u> <u>v. INS, 411 F.2d 683 (D.C. Cir.</u> <u>1969), cert. denied, 396 U.S. 877</u> <u>(1969)</u>	68, 78
<u>Matter of Yau, 14 I. & N. Dec. 630</u> <u>(BIA 1974)</u>	67
<u>Medina-Sandoval v. INS, 524 F.2d</u> <u>658 (9th Cir. 1975)</u>	80-84
<u>Mendoza v. INS, 559 F. Supp. 842</u> <u>(W.D. Tex. 1982)</u>	30, 50, 98
<u>Michigan v. Tucker, 417 U.S.</u> <u>433 (1974)</u>	33
<u>Morales v. Hamilton, 391 F. Supp. 85</u> <u>(D. Ariz. 1975)</u>	52
<u>Navia-Duran v. INS, 568 F.2d 803</u> <u>(1st Cir. 1977)</u>	77, 84, 86
<u>Ng Fung Ho v. White, 259 U.S. 276</u> <u>(1922)</u>	37
<u>O'Shea v. Littleton, 414 U.S. 488</u>	

(1974)	23, 49
<u>One 1958 Plymouth Sedan v.</u> <u>Pennsylvania, 380 U.S. 693</u> (1965)	33, 42
<u>Perez-Funez v. District Directors,</u> <u>INS, No. CV 81-1457-ER, No.</u> <u>CV-81-1932-CBM (C.D. Cal.</u> <u>January 24, 1984)</u>	41
<u>Pizzarello v. United States, 408 F.2d</u> <u>579 (2d Cir.), cert. denied,</u> <u>358 U.S. 986 (1969)</u>	43
<u>Plyer v. Doe, 457 U.S. 202</u> (1982)	81, 82
<u>Rakas v. Illinois, 439 U.S. 128</u> (1978)	105
<u>Rizzo v. Goode, 423 U.S. 362</u> (1976)	23, 50
<u>Rochin v. California, 342 U.S.</u> 165 (1952)	63
<u>Schenck ex rel. Chow Fook Hong</u> <u>v. Ward, 24 F. Supp. 776</u> (D. Mass. 1938)	78
<u>Silverthorne Lumber Co. v. United</u> <u>States, 251 U.S. 385 (1920)</u>	48, 75
<u>Steagald v. United States, 451</u> U.S. 204 (1981)	105
<u>Stone v. Powell, 428 U.S. 465</u> (1976)	32, 34, 40
<u>Terry v. Ohio, 392 U.S. 1</u> (1968)	103

<u>Tirado v. Commissioner of Internal Revenue</u> , 689 F.2d 307 (2d Cir. 1982) <u>cert. denied</u> , --- U.S. ---, 75 L.Ed.2d 484 (1983).....	39
<u>Trias-Hernandez v. INS</u> , 528 F.2d 366 (9th Cir. 1975).....	77
<u>United States ex rel Accardi v. Shaughnessy</u> , 347 U.S. 260 (1954).....	75
<u>United States ex rel, Bilokumsky v. Tod</u> , 263 U.S. 149 (1923)....	66, 75, 84
<u>United States v. Blank</u> , 261 F. Supp. 180 (N.D. Ohio 1966).....	43
<u>United States v. Brignoni-Ponce</u> , 422 U.S. 873 (1975).....	passim
<u>United States v. Caceres</u> , 440 U.S. 741 (1979).....	61, 74
<u>United States v. Calandra</u> , 414 U.S. 338 (1974).....	32, 34-36, 61
<u>United States v. Ceccolini</u> , 435 U.S. 268 (1978).....	80
<u>United States v. Cortez</u> , 449 U.S. 411 (1981).....	31
<u>United States v Janis</u> , 428 U.S. 433 (1976).....	passim
<u>United States v. Johnson</u> , 457 U.S. 537 (1982).....	54
<u>United States v. Martinez-Fuerte</u> ,	

428 U.S. 543 (1976).....	30, 31, 103
<u>United States v. Ortiz</u> , 422 U.S. 891 (1975).....	31
<u>United States v. Peltier</u> , 422 U.S. 531 (1975).....	33
<u>United States v. Wong Quong Wong</u> , 94 F.832 (D. Vt. 1899).....	77
<u>Vlissidis v. Anadell</u> , 262 F.2d 398 (7th Cir. 1959).....	78
<u>Weeks v. United States</u> , 232 U.S. 383 (1914).....	33, 61
<u>Weyerhaeuser Co. v. Marshall</u> , 452 F. Supp. 1375 (E.D. Wis. 1978) aff'd., 592 F.2d 373 (7th Cir. 1979).....	43
<u>Wong Chung Che v. INS</u> , 565 F.2d 166 (1st Cir. 1977).....	76
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963).....	87
<u>Wong Wing v. United States</u> , 163 U.S. 228 (1896).....	85
<u>Wong Yang Sung v. McGrath</u> , 339 U.S. 33 (1950).....	37
<u>Woodby v. INS</u> , 385 U.S. 276 (1966).....	84
<u>Yam Sang Kwai v. INS</u> , 411 F.2d 683 (D.C. Cir.), cert. denied, 396 U.S. 877 (1969).....	104
<u>Yamataya v. Fisher</u> (The Japanese	

Immigrant Case), 189 U.S. 86 (1903).....	85
<u>Constitution, Statutes, Regulations and legislative materials:</u>	
U.S. Const:	
Amend IV.....	passim
Amend V (Due Process Clause)	62-63, 66, 85-86
8 U.S.C. §1252(b).....	41
8 U.S.C. §1357(a)(2).....	10, 106
8 U.S.C. §1361.....	84
28 U.S.C. §2680(h).....	53
8 C.F.R. §1.1(n).....	42
8 C.F.R. §3.0.....	42
8 C.F.R. §3.1(b).....	41
8 C.F.R. §3.1(h).....	41, 73
8 C.F.R. §3.9.....	42
8 C.F.R. §100.2(a).....	42
8 C.F.R. §242.16.....	87
8 C.F.R. §287.4(a)(2).....	87
28 C.F.R. §0.105(a).....	42
28 C.F.R. §0.109.....	42
28 C.F.R. §0.115.....	42

28 C.F.R. §0.116.....	42
28 C.F.R. §0.117.....	42
H.R. 1510, 98th Cong., 1st Sess., §301(a)(1983).....	82
H.R. Rep. No. 98-115, Part 1, 98th Cong., 1st Sess. 87-88 (May 13, 1983).....	82
S. 529, 98th Cong., 1st Sess., §301(a)(1983).....	82
<u>Other Authorities:</u>	
Amsterdam, <u>Perspectives on the</u> <u>Fourth Amendment</u> , 58 Minn. L.Rev. 349 (1974).....	40
<u>Crewdson, The Tarnished Door:</u>	
The New Immigrants and the <u>Transformation of America</u> , Times Books, New York (1983)....	55, 97
Davies, <u>What We Know (and Still Need</u> <u>to Learn) About the "Costs" of</u> <u>the Exclusionary Rule: A Hard</u> <u>Look at the NIJ Study and other</u> <u>Studies of "Lost" Arrests</u> , American Bar Foundation Research Journal, No. 3, 611 (1983).....	44-5
Developments in the Law: <u>Immigration</u> <u>Policy and the Rights of Aliens</u> , 96 Harv.L.Rev.1286 (1983).....	82
C. Gordon and H. Rosenfield, <u>Immigration Law and Procedure</u> , (rev. ed. 1977) (March 1983, Supp.)...	69-70, 80

INS, 1979 Annual Report.....	93-95
<u>INS Operations Instructions, reprinted</u> in 4 Gordon and Rosenfield at 23-566.6 (1983).....	57
<u>INS, U.S. Dept. of Justice, The Law</u> <u>of Arrest, Search, and Seizure</u> <u>for Immigration Offices</u> (Jan. 1983).....	58
I W. LaFave, <u>Search and Seizure</u> (1978).....	33
Memorandum from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus and Divisions, <u>Violations of Search</u> <u>and Seizure Law</u> (Jan. 16, 1981).....	74
Memorandum to Walter P. Connery, Director, Office of Professional Responsibility, from William J. Hannon, Program Analyst, Findings from Review of Substantiated Civil Rights Cases (Feb. 17, 1984).....	61
Mertens and Wasserstrom, <u>The Good Faith</u> <u>Exception to the Exclusionary Rule:</u> <u>Deregulating the Police and Derailing</u> <u>the Law</u> , 70 Geo. L.J. 365 (1981).....	40
"Baby, Deported by U.S. Is Being Returned," <u>New York Times</u> , Sunday, November 14, 1982, A:28:6.....	97
"Roundup of Aliens Meeting Problems," <u>New York Times</u> , Friday, April 30, 1982, A:10:1.....	97

"Teen-ager Deported By Mistake Is Found," New York Times, Tuesday, February 21, 1984 A:16:5.....97

"U.S. Immigration Service Hampered By Corruption," New York Times, Sunday, January 13, 1980, A 1:2.....55

"Violence, Often Unchecked, Pervades U.S. Border Patrol," New York Times, Monday, January 14, 1980, A 1:2, D 8:1.....55-56

Passel and Warren, Estimates of Illegal Aliens from Mexico Counted in the 1980 United States Census, U.S. Bureau of the Census, Washington, D.C. (1983).....92, 94

Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Col. L .Rev. 1365 (1983)....40, 47, 50, 53,63, 82

U.S. Census Bureau, Publication PC 80-1-B1 General Population Characteristics, United States Summary, Table 39 (May 1983).....92

1980 Census of the Population, Vol. I, Characteristics of the Population, Ch. D, Detailed Population Characteristics, Part 6, California, Section I, Table 194.....94

1980 Census of the Population, Vol. I,

Characteristics of the Population, Ch.D, Detailed Population Characteristics, Part 45, Texas, Section I: Table 194.....	94
1980 Census of the Population, Vol. I, Characteristics of the Population, Ch.D, Detailed Population Characteristics, Part 49, Washington, Section I, Table 194.....	95
U.S. Commission on Civil Rights, <u>The Tarnished Golden Door:</u> <u>Civil Rights Issues in</u> <u>Immigration (1980).....</u>	42, 55-59, 99
Wasserman, <u>Immigration Law and</u> <u>Practice</u> , Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association (Oct. 1961).....	70

STATEMENT OF THE CASE

In separate deportation proceedings, Respondents Adan Lopez-Mendoza and Elias Sandoval-Sanchez sought unsuccessfully to suppress the use of evidence obtained by INS agents in violation of the Fourth Amendment.

1. INS arrested Respondent Elias Sandoval in 1976 during a raid at his workplace, a food processing plant, in Pasco, Washington. INS agents surrounded the plant to guard the exits on all four sides (JA 128). Investigator Bower, an INS law enforcement officer, and Officer Spence, a uniformed Border Patrol officer, entered the plant and stationed themselves at the entrance to the main work area during a change in shift. They checked the workers as one group filed past to leave work and another group filed past to enter the main work area (JA 133-34). Sandoval was in a line of workers entering the main work area

to commence work on the 3:00 p.m. shift (JA 148). He was dressed in his work uniform, which included a hard hat and face mask (JA 135-36,148; Pet. App. 106a). Sandoval testified that he did not realize that immigration officers were checking people entering the plant, but that he did see standing at the entrance a man in uniform who appeared to be a police officer (Pet. App. 106a-107a). As he was waiting to enter the main work area, an officer forcibly seized him by the back of the pants and the shoulder, took him out of line and locked him in the men's rest room of the plant (JA 147-48). After being held in the men's rest room for an unknown period of time, Sandoval was one of at least 37 people taken to the Pasco Police Department for further processing (JA 141).

At the deportation hearing, Officer Bower had no recollection of the initial

contact or detention of Sandoval (JA 135-38, 140).^{1/} Bower testified that his general practice was that if there were some kind of furtive conduct in line, such as avoiding eye contact, he would question the subject in

1/ In response to a question from Sandoval's counsel as to why Officer Bower believed he had probable cause to detain Sandoval, Officer Bower testified:

A. We just initially detained because of the large number of people coming in and out of there. I initially detain them to question them further. Some people immediately said they had United States citizen wife, or maybe United States citizen children, and would fall within a category that they may have something going for them. Some were detained for more interrogation to figure out whether they would be taken, left at the plant, or whether they would be further processed in the processing facility, which happens to be the Pasco Police Department in that area.

Q. That is your complete rationale?

A. Yes.

Q. A large number of people, temporary detention, in order to investigate further at your convenience?

A. A lot of them were talked to further ~~there~~ and ones that had wives, ones that had kids, ones that were single, determining which we handled in which manner, whether they should even be left there at the plant. For instance, I had one presented a document of some kind or another, wanted to talk to him more, at the time too busy talking to everybody else, he had to wait for further questioning. (JA 140).

English. His initial questioning consisted of queries such as "Good day outside?" "Hard work here?" "Do you make lots of money here?" (JA 134). For those who failed to respond or "had a dumb look on their face," Bower's practice was to ask in Spanish if the particular person had any papers or to question that person further or to detain him to question at a later time (Pet. App. 106a).^{2/}

At the Pasco Police Department, Sandoval was processed by Officer Bower who explained to Sandoval the I-274 (voluntary departure) form which contains an explanation of the right to a deportation hearing and a right to counsel. Sandoval's wife read the explanation

^{2/} It is unclear from the record whether any immigration officer said anything to Sandoval prior to his detention (JA 148). The record contains numerous omissions of Sandoval's testimony at JA 146-51. In addition, the record contains no evidence indicating that Sandoval was questioned while in the men's room or prior to his involuntary removal to the Pasco Police Department.

in Spanish to him, but he did not understand it, and did not know he had the right to remain silent (JA 146-47; Pet. App. 107a). Sandoval refused to sign the I-274 requesting voluntary departure^{3/} and asked for his counsel, Charles Barr (JA 143, 147). Officer Bower filled out an I-213, "Record of Deportable Alien," in which he indicated that Sandoval was born in Mexico and that he entered the U.S. without inspection (JA 162).

During the deportation hearing the government offered the I-213 to prove deportability (JA 125, 132). Sandoval's counsel moved to suppress the I-213 and to terminate the proceedings (Pet. App. 105a; JA 125, 151, 157). He argued that the evidence relied upon by the government should be

^{3/}At the police station, the group of 37 persons apprehended at the factory were first given the option of voluntary departure. The INS had a bus waiting to go to Mexico immediately. Out of the 37, a group of 13 immediately opted for voluntary departure, and they were processed first (JA 141).

suppressed because the warrantless arrest was unlawful and the I-213 was the "fruit of the poisonous tree." The immigration judge ruled that the arrest did not violate the Fourth Amendment: "The respondent could have at some time during the time in question reacted in a furtive manner in the presence of officials. This plus foreign appearance would . . . give rise to a suspicion of alienage . . . The respondent has failed to prove that this is not what took place in this case." (Pet. App. 107a-108a) (emphasis supplied). Based on the written record of Sandoval's admissions contained in the I-213, the immigration judge found him deportable, but granted him the privilege of voluntary departure.

On appeal, the Board of Immigration Appeals (BIA) held that Sandoval's statements were voluntary and found "no basis to conclude . . . that the circumstances of the

respondent's arrest affected the statements contained in the form I-213," citing its decision in Matter of Sandoval, 17 I.& N. Dec. 70 (BIA 1979), in which contrary to its prior longstanding practice, it held the Fourth Amendment exclusionary rule inapplicable in deportation proceedings (Pet. App. 112a).

2. Respondent Lopez was arrested by INS agents in August 1976 at his workplace, a wholesale transmission repair shop in San Mateo, California. Nearly a full month before the arrest, INS Agents Eddy and Elder had received an interoffice memorandum regarding a tip received by INS that seven named illegal aliens were working there (JA 16,104).^{4/} The day before the arrest, they drove past the shop, confirmed its location,

^{4/} The immigration judge made no factual findings pertinent to Lopez's suppression motion; we therefore rely here on relevant record testimony.

and telephoned the informant, a person previously unknown to them. Based solely on their telephone conversation, which yielded no additional details, they decided to visit the shop the next day for the purpose of interviewing the persons named by the informant (JA 16, 28-9, 40-1). At no time did the agents seek an arrest warrant for the named individuals or a search warrant to enter and search the private business premises. In fact, they had concluded that they did not have enough information to obtain either an arrest or search warrant (JA 28,32,47,53).

The two agents arrived at the shop at approximately 7:45 a.m. One agent approached the owner, Art Bradley, to request permission to conduct the interviews while the other stationed himself at the only door so that anyone inside would be prevented from leaving the premises. The owner refused permission

for interviews during working hours "without a court order" (JA 19). Because the agents "didn't feel like waiting four hours" by the door in order to apprehend anyone leaving before lunchtime (JA 53), they persisted in their demand for immediate interviews. As their persistence intensified, so did the owner's agitated refusal, until he eventually demanded that the city police be called (JA 72, 21-2).^{5/}

While agent Elder diverted the attention of the owner, agent Eddy advanced into the shop and approached Lopez. Under the government's view of the facts, the agent chose him for questioning solely because he was "relatively isolated" and therefore the

^{5/}Under Lopez's offer of proof, testimony would have been presented establishing that when Bradley, the owner, instructed one of his employees to call the San Mateo city police, agent Eddy said "No, don't call the police" to the employee, further exacerbating the uneasy sense of those in the shop that something illegal was occurring (JA 72-3).

owner could not interfere with the interview (JA 23).^{6/} The agent maintained that nothing in Lopez's appearance, behavior, or speech had aroused his suspicion. Furthermore, according to the agent, Lopez's name was not on the list provided by the informant. In response to the agent's questioning, Lopez gave his name and indicated that he was from Mexico with no close family ties in the United States (JA 20-21). The agent placed him under arrest.^{7/} Both agents then engaged in an

^{6/} Respondent Lopez was prepared to establish at his deportation hearing, through owner Bradley's testimony, that the agents had Lopez's name before going to the transmission shop, that the agents did not show Bradley the list of names provided by the informant but instead specifically asked for Adan Lopez-Mendoza by name, and that agent Eddy approached Respondent for questioning because of the name "Adan" sewn on his work shirt. If the agents had Lopez's name before going to the transmission shop, there is no justification for their failure to obtain an arrest warrant. The statutory authority for INS agents to make arrests, 8 U.S.C. §1357(a)(2), presupposes that warrants must be obtained absent exigent circumstances.

^{7/} The agent also questioned another worker, Nelson

argument with Bradley, which at this point bordered on a physical confrontation (JA 38). Bradley placed himself between the agents and Lopez and indicated that they had no right to remove him without a court order. Agent Eddy emphatically poked Bradley on the chest with his finger and said that if he continued to interfere, they would arrest him (JA 38). They then departed with Lopez in custody.

Lopez underwent further interrogation at INS offices where, without advice of counsel, he allegedly admitted he was born in Mexico, was still a citizen of Mexico, and that he entered without inspection (JA 82-3). Based on his answers, the agents prepared the I-213 and an accompanying affidavit (JA 98-9).

The only evidence introduced by the INS

Melendez, a permanent resident, who was asked for his name and whether he was a citizen or resident of the United States (JA 72).

against Lopez at his deportation hearing was this Form I-213, and the accompanying affidavit. Prior to the proceeding on the merits, Lopez, through counsel, sought a hearing on the legality of the arrest (JA 14). The immigration judge determined prior to the completion of the hearing that an illegal arrest did not affect "the propriety" of the proceeding. He therefore declined to make findings of fact regarding the legality of the arrest (JA 79), although he did allow counsel for Lopez to make an offer of proof (JA 69-74). The immigration judge found Lopez deportable, and granted him the privilege of voluntary departure (Pet. App. 97a-99a). The BIA dismissed his appeal, relying upon its decision in Matter of Sandoval, supra (JA 163).

3. On petitions for review of their deportation orders, the Ninth Circuit consolidated the cases for argument en banc,

and held in a seven to four decision 1) that Sandoval's detention at the police station constituted an arrest not based upon probable cause, and was therefore unlawful under the Fourth Amendment; 2) that Sandoval's admission of illegal alienage was a product of the unlawful arrest within the meaning of Brown v. Illinois, 422 U.S. 590 (1975); and 3) that "the exclusionary rule bars the INS from using, in deportation proceedings, evidence of statements it obtains illegally." (Pet. App. 3a). The court reversed Sandoval's order of deportation. Finding the record insufficient to determine whether the Fourth Amendment had been violated in Lopez's case, the court of appeals vacated and remanded Lopez's order of deportation for further proceedings in light of its opinion.^{8/}

^{8/}The question of whether Lopez's detention violated the Fourth Amendment was not adjudicated in his deportation hearing.

In reaching its decision, the court of appeals applied the analysis set forth in United States v. Janis, 428 U.S. 433 (1976). The court first examined the strength of the connection between those who illegally obtained the evidence, and those who sought to use it in a subsequent proceeding. The court observed that the officers and prosecutors not only are members of the same government agency, the INS, but also share a common goal and purpose. The INS agents who interrogated Sandoval after arresting him "did so exclusively to aid in filling out INS Form I-213, the form used by INS attorneys at Sandoval's deportation hearing to prove deportability." (Pet. App. 23a).

The court next considered the extent to which the persons whose "conduct is to be controlled" are otherwise subject to the deterrent effects of the rule. Because

deportation of illegal aliens is the prime concern of immigration officers, rather than criminal prosecutions, the court concluded that deportation is within the agent's "zone of primary interest." (Pet. App. 24a). The court concluded that the deterrent value of exclusion in deportation proceedings is direct, substantial, and efficient.

The court observed that the sanction is "routinely" applied in "core" cases like the present one where the deterrent value is strong, without further balancing the value of enforcing the Fourth Amendment against various non-constitutional social costs. Nevertheless, the court proceeded under Janis to assess the "social cost of applying the exclusionary rule in deportation proceedings and to balance that cost against the substantial deterrent impact of the sanction on INS misconduct" (Pet. App. 27a), and concluded that the deterrent benefit "far

outweighs" the social cost of "barring the INS from using in deportation proceedings evidence which its officers seize in violation of the Fourth Amendment." (Pet. App. 32a). The court also examined and rejected as "unrealistic and unacceptable" each of the alternatives to the exclusionary rule suggested by INS (Pet. App. 33a-35a). In sum, the court concluded, based in part on past INS experience with the rule, that the "only realistic way" to ensure that INS agents respect the Fourth Amendment is to apply the exclusionary rule in deportation proceedings (Pet. App. 37a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents the first judicial re-examination of the application of the exclusionary rule in deportation proceedings since the BIA in 1979, in the words of the court below, "cut against the grain of its own historic practice and the views of every

court and commentator to have considered the issue," (Pet. App. 13a), and held, in a case unrelated to this one, that the exclusionary rule does not bar the INS from using evidence obtained in violation of the Fourth Amendment. Matter of Sandoval, 17 I. & N. Dec. 70 (BIA 1979) (sanctioning use of evidence seized by INS agents during illegal search of alien's home). In holding that the rule does apply, the court of appeals followed a long and consistent history of the rule's application in deportation proceedings by the federal courts, and until recently, by the BIA. Contrary to the government's characterization of the decision below as "extending" the exclusionary rule "to an entirely new category of cases" and creating a "new barrier" to enforcement of immigration laws (Pet. Br. 10-11), it merely marks a return to longstanding former practice. Until 1979, the INS "performed its

investigative and prosecutorial functions in a legal regime in which the exclusionary rule was thought to apply." (Pet. App. 14a).

Abandonment of the exclusionary rule in deportation proceedings, after over sixty years of applicability, poses palpable dangers to the Fourth Amendment rights of discrete racial and ethnic minorities, particularly those of Hispanic Americans. The Fourth Amendment, which, as the government concedes, applies to documented and undocumented aliens found in this country, as well as to citizens, safeguards against undue interference with the privacy and security of law-abiding persons, and protects against frightening or unsettling shows of arbitrary authority by government officials. E.g., Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Without the exclusionary rule -- the only effective device for enforcing the Fourth Amendment in

the immigration context -- the Fourth Amendment rights of those citizens who share racial, ethnic, and linguistic characteristics with the targets of immigration searches will inevitably suffer a crippling blow. Such citizens are already, at a minimum, subjected to a heightened degree of suspicion and scrutiny by INS officers, solely because of their race.

Freed from the deterrent constraints of the exclusionary rule, and subject to the predictable pressures of enforcing immigration laws, immigration officials would inevitably ignore the careful balancing of Fourth Amendment protections and law enforcement needs which this Court has structured. Most Americans, on the other hand, who are insulated against suspicion of being undocumented aliens by accidents of color and language, would continue to enjoy full Fourth Amendment protection.

Although the government maintains that the court of appeals correctly applied the cost-benefit analysis outlined in United States v. Janis, 428 U.S. 433 (1976), it argues that the court erred in the "values it brought to its analysis" (Pet. Br. 23, emphasis added), and additionally urges that the weighing of costs and benefits should not be "performed on scales that are evenly balanced" (Pet. Br. 20). In effect, the government asks Hispanic Americans to surrender the enjoyment of their Fourth Amendment rights to permit more efficient enforcement of the immigration laws.

Although the court below recognized and appreciated the "enormity of the enforcement task that Congress has assigned INS" (Pet. App. 32a), it properly rejected such an unjust result. Where the government has left out of the balance the burden which would be imposed on Hispanic Americans if the rule

were abandoned, it is particularly inappropriate to insist that Respondents bear the burden of empirically proving the rule's past effectiveness, especially in light of the Court's acknowledgement in Janis of the virtual impossibility of doing so. Moreover, based on past experience of applying the rule in deportation proceedings, as well as the BIA's post-Matter of Sandoval practice of reaching Fifth Amendment issues, including under this rubric particularly flagrant Fourth Amendment violations, the court below was fully justified in concluding that its decision would not unduly burden the INS enforcement system. Whatever the solution to the intractable problem of illegal immigration, it does not lie in judicial abandonment of Fourth Amendment values.

I. A. Excluding evidence obtained in violation of the Fourth Amendment exerts a necessary and substantial deterrent effect on

unconstitutional INS conduct. Deportation of illegal aliens, not criminal prosecution, constitutes the primary concern of INS officers. In addition, the offending officer and the agency which uses the evidence share a common law enforcement goal and purpose. Thus, unlike Janis, where exclusion would exert, at most, only a marginally increased deterrent effect on inter-sovereign unconstitutional behavior, the continued applicability of the exclusionary rule in deportation proceedings would exert a direct and substantial deterrent effect on intra-agency unconstitutional conduct.

The alternatives to the exclusionary rule proposed by INS do not provide equally effective protection of Fourth Amendment rights. These alternatives have been used in the past to supplement the application of the exclusionary rule, but are wholly ineffective in adequately deterring Fourth Amendment

violations. Nearly insurmountable standing and equitable prerequisites render injunctive relief extremely difficult to obtain. City of Los Angeles v. Lyons, --- U.S. ---, 75 L.Ed. 2d 675, 103 S.Ct. 1660 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974), and it is in any event unavailable until after the deterrence mechanism has failed. Civil damage actions are expensive to bring, time consuming, not readily available, and, because of the availability of immunity, provide no disincentive for close cases and no incentive for adoption of system-wide procedures to ensure constitutional behavior. Reliance on internal rules, training and discipline has never been effective in deterring Fourth Amendment violations, and in the case of INS has utterly failed to stop even the most flagrant and appalling misconduct. Finally, a Fifth

Amendment due process exclusionary rule for "egregious" violations of Fourth Amendment rights deters only egregiously severe searches and seizures, and permits unreasonable, but less severe, violations. In effect, it rewrites the Fourth Amendment itself in the immigration context. Only the exclusionary rule provides a remedy adequate to safeguard these important values.

B. In assessing the societal costs of suppression, the government less than candidly ignores past and present BIA practice of suppressing evidence obtained in violation of Fifth and Fourth Amendment rights. The government's speculative discussion of the practical effects of the rule ignores the system's actual acceptance of and demonstrated ability to cope with suppression rulings in deportation proceedings. As illustrated by past administrative and judicial history, applying

the exclusionary rule in deportation proceedings will not unduly impede INS enforcement of immigration laws, and will not result in a granting of immunity from deportation. The government's attempts to rely on non-record "facts," which are patently untrustworthy and inaccurate, cannot provide the missing factual underpinnings for its arguments.

C. Given the long history of applying a rule of exclusion in deportation proceedings, and the pressures for enhanced enforcement now faced by INS, abandonment of the rule at this time without the existence of equally effective alternatives will inevitably lead to an "open season" on Hispanic Americans, resulting in the wholesale violation of Fourth Amendment rights based on racial or ethnic appearance. Balancing the societal costs of exclusion against the harm to the rights of Hispanic Americans which would flow

from the loss of the rule's substantial deterrent impact on INS misconduct, the rule must be applied in deportation proceedings.

II. To the extent that the government argues that application of the exclusionary rule is unworkable in the immigration context, its real quarrel is with the Fourth Amendment itself. It is the Fourth Amendment that puts restrictions on INS officers, not the exclusionary rule. The Fourth Amendment requires that searches and seizures be based on specific objective facts indicating that society's legitimate interest requires such action, or that the seizure be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. Brown v. Texas, 443 U.S. 47 (1979); Delaware v. Prouse, 440 U.S. 648 (1979).

The substantial underlying Fourth Amendment violations in this case involve at

worst a flagrant disregard of probable cause requirements, Dunaway v. New York, 442 U.S. 200 (1979), and at best a reckless failure by INS to avoid the danger of arbitrariness by instituting and following a plan embodying neutral limitations on the unbridled discretion of its officers. Cf. Delaware v. Prouse, supra. By failing to seek review of the Fourth Amendment ruling in this case, the government forfeited its right to challenge the underlying Fourth Amendment holding. In any event, the court below properly concluded that the INS violated Respondent Sandoval's Fourth Amendment rights by arresting him without probable cause, and correctly remanded Respondent Lopez's case for further factual findings.

ARGUMENT

I. THE COURT BELOW CORRECTLY APPLIED THE EXCLUSIONARY RULE IN DEPORTATION PROCEEDINGS

Unless the exclusionary rule is applied in deportation proceedings to enforce the Fourth Amendment against immigration officials, millions of law-abiding Hispanic Americans who share racial, ethnic and linguistic characteristics with the targets of immigration searches will inescapably be exposed to wide-ranging intrusions into their personal and professional lives at the hands of officials who confuse ethnicity with probable cause. If the exclusionary rule -- the only effective device for enforcing the Fourth Amendment in an immigration context -- is abandoned after over 60 years of applicability, two tiers of Fourth Amendment protection will exist in the United States. Most Americans, insulated against suspicion

of being undocumented aliens by accidents of color and language, will continue to enjoy full Fourth Amendment protection. Hispanic Americans, on the other hand, will be subject to a wholly different regime under which immigration officials, alerted by racial or ethnic characteristics, will be free to carry out unlawful intrusions without the deterrent constraints of the exclusionary rule.

This Court has long recognized the obvious danger of permitting racial or ethnic characteristics to play a substantial role in determining the reasonableness of an investigatory intrusion. E.g., Davis v. Mississippi, 394 U.S. 721 (1969); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Despite these misgivings, however, the Court, concerned with the difficulty of enforcing the immigration laws, has suggested that ethnic characteristics may be relevant in determining whether sufficient grounds

exist for an investigative stop of a putative undocumented alien. United States v. Brignoni-Ponce, supra at 886-887; United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976). At a minimum, therefore, Hispanic Americans who share the physical characteristics of undocumented aliens are already subject to a heightened degree of suspicion and scrutiny by immigration officials solely because of their race. Because they live and work alongside the aliens INS seeks to apprehend, these Americans have frequently found themselves swept into intrusive and arbitrary INS workplace raids and neighborhood dragnets.^{9/} If, in addition to the

^{9/} Patterns of INS conduct described in reported cases evidence widespread Fourth Amendment violations by immigration officers in such operations. E.g., INS v. Delgado, No. 82-1271 (argued on January 11, 1984); Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976), modified on rehearing en banc, 548 F.2d 715 (7th Cir. 1977); LaDuke v. Nelson, 560 F. Supp. 158 (E.D. Wash. 1982); Mendoza v. INS, 559 F. Supp. 842 (W.D. Tex. 1982); Marquez v. Kiley, 436 F.

inevitable burden created by the existence of shared racial characteristics, this Court were to remove the deterrent effect of the exclusionary rule, the Fourth Amendment rights of Hispanic Americans would suffer a crippling blow. Freed from the deterrent constraints of the exclusionary rule and subjected to the nearly overwhelming pressures of enforcing immigration laws, immigration officials would inevitably intensify dragnet techniques and would inevitably ignore the careful balance struck by Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); and United States v. Cortez, 449 U.S. 411 (1981). Law abiding Hispanic Americans would

Supp. 100 (S.D.N.Y. 1977). See also note 84, infra. 3

inexorably be swept into a net of suspicion, humiliation and fear. In effect, in this case, the government asks Hispanic Americans to surrender the enjoyment of their Fourth Amendment rights to permit more efficient enforcement of the immigration laws. That is a price no American may be asked to pay.

A. Application of the Exclusionary Rule in Deportation Proceedings Provides Substantial, Efficient, and Necessary Deterrence of Unconstitutional INS Conduct

This Court has utilized two common sense criteria in determining whether to exclude evidence gathered in violation of constitutional norms: First, it has inquired whether excluding the evidence would exert a substantial deterrent effect on unconstitutional conduct;^{10/} second, it has

^{10/} E.g., United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974). The "imperative

considered whether the consequences of the proceeding are sufficiently serious to warrant the rule's protection.^{11/} Applying the Court's analysis, the deportation

of judicial integrity" has also played a role in this Court's rulings. See, e.g., Elkins v. United States, 364 U.S. 206,222-223 (1960); Weeks v. United States, 232 U.S. 383, 392-394 (1914). In recent cases, concern regarding "judicial integrity" has focused on the question "whether the admission of the evidence encourages violations of Fourth Amendment rights," United States v. Janis, 428 U.S. at 458 n.35, and has been viewed as essentially merged with the question of whether exclusion would serve a deterrent purpose. See United States v. Peltier, 422 U.S. 531,538 (1975); Michigan v. Tucker, 417 U.S. 433,450 n.25 (1974). Although we submit that judicial integrity underlies the rule quite apart from deterrent concerns, for the purposes of this brief, we concentrate on the rule's deterrent purpose.

^{11/} See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Boyd v. United States, 116 U.S. 616 (1886). As explained in 1 W. LaFave, Search and Seizure §1.5 at 98 (discussing the application of the exclusionary rule to administrative hearings), the Plymouth Sedan case "strongly suggests that a highly relevant (but not necessarily controlling) factor is the magnitude of the consequences for the individual involved." Exclusion would be "most compelling when the administrative agency has an investigative function and investigative personnel of that agency participated in the illegal activity for the purpose of providing information to support administrative proceedings against the suspect." Id. at 99.

proceedings here fall at the very core of the Court's concerns.

Unlike grand jury,^{12/} federal habeas corpus,^{13/} or inter-sovereign civil tax proceedings,^{14/} where this Court held that exclusion would effect, at most, a marginally increased deterrent effect on unconstitutional behavior, the continued applicability of the exclusionary rule in deportation proceedings would exert a direct and palpable - indeed the only direct and palpable - deterrent effect on the use of unconstitutional investigatory methods by immigration officials. Where, as in Calandra, Stone v. Powell and Janis, the principal purpose of an investigation is to gather evidence for a criminal proceeding,

^{12/} United States v. Calandra, 414 U.S. 338 (1974).

^{13/} Stone v. Powell, 428 U.S. 465 (1976).

^{14/} United States v. Janis, 428 U.S. 433 (1976).

the presence of an exclusionary rule in the criminal proceeding already exerts a deterrent effect on the average investigation which can only be marginally enhanced by imposing an exclusionary rule on the grand jury process, by providing collateral habeas corpus review of the legality of a state investigation, or by imposing an exclusionary rule in an inter-sovereign civil tax proceeding.^{15/} Where, however, as here, the principal purpose of an investigation is to gather evidence for deportation, the applicability of an exclusionary rule to

^{15/} The focus on deterrence rather than on punishment or compensation of particular individuals derives from the rule's role as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974). Thus, the rule is designed to "prevent, not to repair," to "compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960).

civil deportation proceedings is the only effective way to deter Fourth Amendment violations by immigration investigators.^{16/} The possible application of the exclusionary rule to a rare or a non-existent criminal proceeding can exert virtually no deterrent effect. Moreover, unlike a civil tax

^{16/} Contrary to the government's assertion, the fact that the primary enforcement efforts of INS agents are directed toward deportation, which has long been classified as a civil rather than criminal sanction, does not diminish the need for Fourth Amendment protections. Where the government intrudes, "the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." Delaware v. Prouse, 440 U.S. 648, 662 (1979), quoting Marshall v. Barlow's, Inc., 436 U.S. at 307, 312-313 (1978).

The relationship between the seizer of the evidence and its use is the relevant criterion, not the nature of the sanction applied in the proceedings. This Court's decision in United States v. Calandra, supra, quoted out of context by the government, is not to the contrary (Pet. Br. 22). In discussing the exclusionary rule, the Court in Calandra noted that the need for deterrence and the rationale for excluding evidence are strongest where the government seeks to use such evidence to "incriminate the victim of the unlawful search." 414 U.S. at 348. Precisely the same considerations apply here, where the government seeks to deport the victim of the unlawful search or seizure.

proceeding, where the stakes are primarily economic, this Court has long recognized both the public interest in enforcement of immigration laws and the fact that deportation proceedings may result in the loss "of all that makes life worth living."

Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). See also Bridges v. Wixon, 326 U.S. 135, 154 (1945); Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950).

Thus, whether one views the issue in terms of the deterrent effect of the exclusionary rule or the potential consequences of the proceeding, the prior decisions of the Court compel the conclusion that the exclusionary rule is fully applicable to a deportation hearing. Moreover, when one balances the societal costs of exclusion against the harm to the rights of Hispanic Americans which would inevitably flow from abandonment of the

rule's substantial deterrent impact on INS misconduct, the balance clearly falls in favor of applying the exclusionary rule in deportation proceedings.^{17/}

1. Deportation Falls Within the Offending INS Officers' "Zone of Primary Interest"

Obtaining evidence of deportability is in the offending agent's "zone of primary interest." See United States v. Janis, 428 U.S. at 458. Deportation of illegal aliens, not criminal prosecution, is the primary concern of immigration officers, as the government concedes (Pet. Br. 37). Fewer than 2% of deportable aliens are ever convicted of criminal violations of immigration laws (Pet. App. 24a). It is therefore highly unlikely that INS officers

^{17/} Given the strong deterrent effect of applying the rule in this context, the government appropriately bears the burden of demonstrating that abolition of the rule will not lead to widespread arbitrary intrusions in Hispanic American communities.

will be adequately deterred from violating the Fourth Amendment solely by the prospect of unsuccessful criminal prosecutions.^{18/}

The government argues that any deterrent effect of applying the rule is minimal because the comparatively high number of arrests made by each officer and the large percentage of aliens who opt for voluntary departure (rather than requesting a hearing) mean that "less is at stake" in each case, and, thus, that there is less incentive to engage in unlawful searches and seizures (Pet. Br. 37-9). But INS success is measured by the number of illegal aliens deported by the agency as a whole. Strong systemic

^{18/} As set forth in Tirado v. Commissioner of Internal Revenue, 689 F.2d 307, 311 (2d Cir. 1982), cert. denied, --- U.S. --, 75 L.Ed. 2d 484 (1983), the "key question is whether the particular challenged use of the evidence is one that the seizing officials were likely to have had an interest in at the time - whether it was within their predictable contemplation and if so, whether it was likely to have motivated them."

incentives presently encourage INS agents to focus on the quantity of apprehensions rather than their quality under constitutional standards; only the "strong medicine" of the exclusionary rule would force INS officers and their supervisors to conform to the constitutional limits of their authority in their investigations.^{19/} Because each individual officer cannot know in advance which aliens will opt for a hearing,^{20/} the

19/ The exclusionary rule acts as a powerful incentive to adoption of law enforcement procedures designed to comply with Fourth Amendment guidelines. See, e.g., Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Col.L.Rev. 1365, 1400 (1983); Mertens and Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 399-401 (1981); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349,429 (1974); see also Stone v. Powell, 428 U.S. at 492 (over the long term, the exclusionary rule "encourage[s] those who formulate law enforcement policies and the officers who implement them to incorporate Fourth Amendment ideals into their value system").

20/ In Respondent Sandoval's case, only about one-third of those transported to the police station opted for immediate voluntary departure. See note 3, supra. Although built-in incentives encourage aliens

rule would force the agency to ensure that its investigative officers generally conform to the Fourth Amendment.

Moreover, the connection between those who illegally obtained the evidence and those who seek to use it in a subsequent proceeding could not be more direct. The INS not only apprehends deportable aliens and initiates proceedings against them, but also adjudicates their entitlement to remain in the country.^{21/} The offending officer and

to waive a deportation hearing, especially if they wish to avoid lengthy detention or wish to reenter the country, see 8 U.S.C. §1326, it would of course be unlawful for INS agents to coerce involuntary waivers of hearings. See Perez-Funez v. District Director, INS, No. CV 81-1457-ER, No. CV-81-1932-CBM (C.D. Cal. January 24, 1984) (INS voluntary departure procedures for unaccompanied minors violate due process).

21/ Deportation hearings are conducted by immigration law judges. 8 U.S.C. §1252(b). The Board of Immigration Appeals (BIA) hears appeals from decisions of the immigration law judges, 8 C.F.R. §3.1(b), and its decisions are subject to review by the Attorney General. 8 C.F.R. §3.1(h).

Until recently, immigration judges were subject to the budgeting control of INS District Directors, who also have major law enforcement responsibilities. Conflicting priorities and the lack

the agency which uses the evidence share a common goal and purpose. In contrast to Janis where the Court declined to apply the exclusionary rule in a federal civil tax proceeding involving violation of the Fourth Amendment by state criminal law enforcement officials,^{22/} this case involves not only an

of sufficient administrative support led to backlogs in deportation cases ranging from 3 months to 2 years. See U.S. Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration (1980) at 110-111 (citing testimony of former Chief Immigration Judge Herman Bookford); see also Marcello v. Bonds, 349 U.S. 302, 305-310 (1955). Last year, INS adjudicative functions were organized under a newly created office, the Executive Office for Immigration Review, under the Associate Attorney General's supervision. See 8 C.F.R. §§1.1(n); 3.0-.1; 3.9; 100.2(a); 48 Fed. Reg. 8038-39 (Feb. 25, 1983); 28 C.F.R. §§0.105(a); 0.109; 0.115-0.117; 48 Fed. Reg. 8056-57 (Feb. 25, 1983).

22/ In addition, deportation proceedings are more quasi-criminal than civil in nature. Deportation, a severe sanction in itself, is imposed for violation of the same immigration laws on which criminal prosecutions are based, 8 U.S.C. §§1325, 1326, and thus closely resemble civil forfeiture proceedings. Application of the exclusionary rule may therefore be alternatively justified under the rationale of One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (forfeiture of article used in violation of criminal law). See also Jordan v. DeGeorge, 341 U.S. 223, 231 (1951); Fong Haw Tan v. Phelan, 333 U.S. 6,10

intra-sovereign violation, but also an intra-agency violation.^{23/} The deterrent impact of

(1948). As noted by dissenting Board Member Applemen in Matter of Sandoval, 17 I. & N. Dec. at 95-96, "[i]n essence, civil and criminal [immigration] proceedings walk hand in hand in intrasovereign wedlock."

23/ As noted in Janis, 428 U.S. at 456, the seminal cases that apply the exclusionary rule to civil proceedings involve intrasovereign violations, where the proceedings are closely related to the goals of the investigation that occasioned the unlawful conduct. E.g., Donovan v. Sarasota Concrete Company, 693 F.2d 1061 (11th Cir. 1982) (affirming Occupational Safety and Health Review Commission's use of exclusionary rule to suppress evidence obtained in unreasonable administrative inspection); Weyerhaeuser Co. v. Marshall, 452 F. Supp. 1375 (E.D. Wis. 1978), aff'd, 592 F.2d 373 (7th Cir. 1979) (ordered suppression of evidence in OSHA proceeding obtained through inspection made pursuant to warrant issued without probable cause); Pizzarello v. United States, 408 F.2d 579 (2d Cir.), cert. denied, 396 U.S. 986 (1969) (evidence unlawfully seized by IRS agents for use in criminal tax proceeding was barred from use in IRS civil tax proceeding); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 406-409 (S.D. Iowa 1968), aff'd sub nom., Standard Oil Co. v. Iowa, 408 F.2d 1171 (8th Cir. 1969) (business records seized by state attorney general excluded from resulting civil antitrust proceeding); Knoll Associates, Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968) (documents seized for purposes of FTC investigation excluded from resulting hearing); see also United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966) (exclusionary rule in federal civil tax assessment proceeding bars admission of evidence obtained in unlawful IRS search).

invoking the rule in deportation proceedings is therefore substantial and efficient.

Apparently sensing that Janis does not easily support its case, the government now suggests that the factors outlined in Janis do not in themselves establish the need for a deterrent sanction, and urges this Court to adopt a new approach, placing on Respondents the burden of empirically proving the beneficial effects of applying the sanction in deportation proceedings. That approach should be rejected in this case for the same reason the Court has rejected similar suggestions in the past. No effective quantitative measure of the rule's deterrent efficacy has been devised or applied. As this Court emphasized in Janis, 428 U.S. at 451-452, no available studies provided reliable conclusions:^{24/}

^{24/} Post-Janis studies also fail to provide adequate empirical data on the efficacy of the exclusionary rule. See, e.g., Davies, What We Know (and Still Need

The number of variables is substantial, and many cannot be measured or subjected to effective controls. Recordkeeping before Mapp was spotty at best, and thus severely hampers before-and-after studies. Since Mapp, of course, all possibility of broad-scale controlled or even semi-controlled comparison studies has been eliminated.

The same obstacles prevent any such study of the deterrent effect of applying the rule in deportation proceedings. As the Solicitor General well knows, INS recordkeeping does not afford a reliable basis for statistical analysis.^{25/} Even if adequate records existed, the long history of applying the rule to deportation proceedings would make any before-and-after comparison impossible or so restricted in time that it would invalidate any conclusions drawn from such a comparison.

to Learn) About the "Costs" of the Exclusionary Rule: A Hard Look at the NIJ Study and Other Studies of "Lost" Arrests, American Bar Foundation Research Journal, No.3, 611,629 (1983).

25/ See discussion at 58,45,88-90, *infra*.

2. The Alternatives to the Exclusionary Rule Proposed By INS Are Neither Realistic Nor Viable Substitutes, and Would Not Provide Protection of Fourth Amendment Rights

The court below properly rejected as both unrealistic and unacceptable the alternatives to the exclusionary rule proposed by INS. After considering the inherent limitations of each of the alternatives urged by INS, the court of appeals correctly placed the burden on INS to demonstrate that its proposed alternatives, either singly or taken together, constituted a viable substitute for the rule. INS insists that the court's approach was "backward," and that the court erred in requiring INS to demonstrate the actual effectiveness and workability of its alternatives (particularly its disciplinary procedures) before accepting them as adequate safeguards against the overzealous conduct of

INS officers (Pet. Br. 44). Given the direct and substantial deterrent effect of the rule in this context, and the long history of applying the suppression sanction in deportation proceedings (see infra pp. 65-79), however, the court below properly declined to abandon the rule in the absence of such a showing by INS.^{26/} We urge the Court to exercise similar caution, particularly in light of INS failure to demonstrate any actual internal effort to monitor Fourth Amendment violations, or to discipline officers for such unlawful

^{26/} As Justice Stewart has recently observed in The Road to Mapp v. Ohio and Beyond, supra, 83 Col. L. Rev. at 1386,

"[W]hen the effectiveness of alternative remedies is considered, we must bear in mind that the exclusionary rule is now part of our legal culture. Realistic appraisals of the effectiveness of the rule must, therefore, take into account the inevitable misperceptions that will arise in the minds of many that 'repealing the rule' would signal a weakening of our resolves to enforce the dictates of the fourth amendment."

conduct. The alternative remedies urged by the INS have been used in the past to supplement the application of the exclusionary rule, but for the reasons set forth below, are wholly ineffective in adequately deterring Fourth Amendment violations. Without efficacious sanctions, the Fourth Amendment would remain a mere "form of words" for those most in need of protection.^{27/}

a. Although the government argues that declaratory or injunctive actions offer "appropriate vehicles for correcting any institutional practices that might violate Fourth Amendment rights" (Pet. Br. 46), there are nearly insurmountable standing and equitable prerequisites which render injunctive relief extremely difficult to

27/ See Mapp v. Ohio, 367 U.S. 643, 648 (1961), quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

obtain even when violations may be flagrant or widespread. Under City of Los Angeles v. Lyons, -- U.S. --, 75 L.Ed.2d 675 (1983), a victim of an illegal INS search or seizure would be required to make a "showing of a real and immediate threat of future harm." Since "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects," O'Shea v. Littleton, 414 U.S. 488, 496 (1974), injunctive relief is obtainable only in the few cases where the victims of the search could establish that INS officers would subject them to another unlawful search and seizure. Respondents here and their co-employees, for example, almost certainly could not even now obtain injunctive relief. Moreover, those seeking to enjoin Fourth Amendment violations by INS officers also bear a heavy burden of showing

that widespread violations result from an official INS policy, rather than from a series of unrelated instances. Rizzo v. Goode, 423 U.S. 362 (1976). Finally, even if such hurdles could be overcome, an injunction cannot be obtained without proof that broad scale violations of rights have already occurred.^{28/} Accordingly, an injunction can be obtained only after the deterrence mechanism has failed. Even when all the above prerequisites to maintaining such an action are met, injunctive actions provide a useful supplement to, but not a substitute for the application of the exclusionary rule.^{29/}

28/ See, e.g., International Ladies Garment Workers Union v. Sureck, 681 F.2d 624 (9th Cir. 1982), cert. granted sub nom. INS v. Delgado, -- U.S. --, 76 L.Ed. 2d 805, 103 S.Ct.1872 (1983); Illinois Migrant Council v. Pilloid, 540 F.2d 1062 (7th Cir. 1976), modified on rehearing en banc, 548 F.2d 715 (1977); LaDuke v. Nelson, 560 F. Supp. 158 (E.D. Wash. 1982); Mendoza v. INS, 559 F. Supp. 842 (W.D. Tex. 1982); Marquez v. Kiley, 436 F. Supp.100,109-114 (S.D.N.Y. 1977).

29/ Accord, Stewart, supra, 83 Col.L.Rev. at 1386-89.

b. The same is true of civil damage actions brought by citizens or lawful residents^{30/} pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Bivens actions are expensive to bring, time consuming, not readily available, and rarely successful. Prior to bringing such an action, the citizen whose rights were violated must 1) be aware that the INS officer's conduct was unlawful,

30/ The government concedes, as it must, that undocumented aliens, particularly if they have been deported, are not likely to bring damage suits, (Pet. Br. 47). The complaint that "Bivens suits have become yet another tool in illegal aliens' never-ending quest for delay" (Id. n. 30), is unworthy of a government that often exercises its authority to detain deportable aliens as government witnesses in its own efforts to enforce the law. If its agents have violated the law, the government should not begrudge the honest effort to make them legally accountable to their victims. In rare cases where such actions are brought by deportable aliens, it is within a court's discretion to grant a stay of deportation to permit consultation with attorneys during the pendency of the Bivens suit, and just as surely within the court's discretion to deny a stay where there is an abuse of process.

2) find competent counsel willing to take the case, 3) be able to pay the costs of litigation, and finally 4) be willing to endure protracted proceedings. Once those obstacles are overcome, a favorable judgment is still quite unlikely.^{31/} INS officers have qualified immunity from liability for actions reasonably taken in "good faith." Under Harlow v. Fitzgerald, 457 U.S. 800, 818 (1983), INS officers are shielded from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Moreover, juries are inclined to believe the testimony of law enforcement officers that they performed their duties in good faith because they

^{31/} See, e.g., Marquez v. Kiley, 436 F. Supp. 100, 105-109 (S.D.N.Y. 1977); Morales v. Hamilton, 391 F. Supp. 85 (D. Ariz. 1975); see also Gonzalez v. City of Peoria, 722 F.2d 468, 477-486 (9th Cir. 1983) (§1983 damages action unsuccessful against local police who detained aliens for INS investigation).

generally believe that the vast majority of officers are honest and endeavor to perform their jobs in a lawful manner.^{32/}

Because the government itself concedes that successful Bivens actions are relatively rare, its suggestion that the mere prospect of such suits being brought provides a "powerful disincentive to unlawful conduct" (Pet. Br.48) rings particularly hollow. Although Bivens actions do provide a disincentive for the grossest of constitutional violations,^{33/} they provide no comparable disincentive for closer cases.

32/ Stewart, supra, 83 Col.L.Rev. at 1387.

33/ See Carlson v. Green, 446 U.S.14,18-23 (1980) (Bivens suits and Federal Tort Claims Act (FTCA) actions provide parallel, complementary causes of action). Although Congress in 1974 amended the FTCA to create a cause of action for intentional torts committed by federal law enforcement officers, 28 U.S.C. §2680(h), the government does not rely here on the FTCA as an alternative to the exclusionary rule. For the reasons outlined in Carlson v.Green, supra, the FTCA primarily serves to compensate victims rather than to deter unlawful conduct by law enforcement officers.

Under a Bivens sanction, INS officers have no incentive "to err on the side of constitutional behavior," and may therefore reasonably decide to resolve close questions against compliance with the Fourth Amendment. See United States v. Johnson, 457 U.S. 537, 561 (1982). Furthermore, Bivens actions fail to provide INS with effective incentives to adopt general policies and procedures designed to conform officers' practices to constitutional requirements. Accordingly, Bivens actions do little, if anything, to reduce the likelihood of the vast majority of Fourth Amendment violations.

c. Reliance on internal rulemaking, training, and discipline requires self-policing, a laudatory goal, but one which, in the practical experience of other law enforcement agencies, has "rarely been effective in deterring Fourth Amendment violations." (Pet. App. 34a). The court

below found that INS had made a "commendable effort" to design a disciplinary system, but in the absence of any indication that it was being enforced declined to presume that the guidelines provided an effective deterrent (Pet. App. 35a). The court below properly placed the burden on INS to show that its internal procedures are more effective than the ineffective procedures of other law enforcement agencies. In any event, a closer scrutiny of such procedures fully supports their rejection as an adequate alternative.

The failure of the internal disciplinary system to stop even the most flagrant corruption and brutality has been sharply criticized by INS employees, the public, and the press.^{34/} Numerous deficiencies remain

^{34/} See, e.g., Crewdson, John, The Tarnished Door, Times Books, New York (1983) at 143-171, 208-212; U.S. Commission on Civil Rights, The Tarnished Golden Door, supra, at 117-129; "U.S. Immigration Service Hampered by Corruption," New York Times, Sunday, January 13, 1980, A 1:2; "Violence, Often Unchecked, Pervades U.S. Border Patrol," New York Times, Monday, January 14,

in INS internal disciplinary procedures despite some improvements since a Department of Justice audit discovered serious defects in the complaint process in 1977. Comparing INS internal complaint procedures with analogous procedures designed for the internal investigations units of police departments, the U.S. Commission on Civil Rights concluded in 1980 that "deficiencies remain in the INS complaint process that prevent an adequate response to public complaints of officer misconduct."^{35/} Four years later, INS has not yet revised its

1980, A 1:2, D 8:1 ("What emerges from their [officers'] accounts is a portrait of an agency often eager to keep its misdeeds hidden and, when it cannot, reluctant to administer more than token punishments to wrongdoers.")

35/ U.S. Commission on Civil Rights, The Tarnished Golden Door, supra, at 118-119. Where applicable, the recommendations of the National Advisory Commission on Criminal Justice Standards and Goals, the LEAA National Institute of Law Enforcement and Criminal Justice, and the Police Foundation were used as standards of comparison for evaluating the adequacy of INS's complaint investigating process.

written procedures to comply with the Commission's detailed findings and recommendations for improvements. Most serious among the procedural deficiencies found were the absence of adequate complaint notification requirements, the lack of an agency appeal mechanism for dissatisfied complainants, and the lack of adequate written standards for selection of investigators to handle misconduct cases.^{36/}

^{36/}Id. at 121-126. For example, if during the preliminary investigation a decision is made not to investigate further because the preliminary inquiry does not "reasonably support" the complaint of misconduct, the case is closed and the employee (and not the complainant) is notified. See INS Operations Instructions, reprinted in 4 Gordon and Rosenblatt at 23-566.6-566.21 (1983), (OI) 287.10k(2); 287.10i (2)(a); 287.10m(2)(i), the evidentiary standard of "reasonable support" is not defined, and no guidelines are provided for applying it. The written procedures do not require INS to provide complainants with a description of the investigative process, and provide no appeal mechanism from decisions to close the inquiry. See OI 287.10. Moreover, the INS procedures fail to provide complainants with notice of the outcome of their complaints, regardless of whether or not they result in disciplinary action against an INS officer.

Even if the complaint procedures themselves were free of deficiencies, INS cannot possibly adequately monitor their effectiveness without adequate recordkeeping.^{37/} Yet INS compiles no identifiable statistics on the number of complaints or disciplinary actions involving Fourth Amendment violations by INS officers.^{38/} It therefore has no way of monitoring the effectiveness of its Fourth Amendment training program ^{39/} or of

37/ Id. at 129.

38/ INS classifies such complaints as civil rights complaints, which include complaints regarding physical abuse and other criminal violations of civil rights statutes, see OI 287.10d, and destroys its records after an elapse of specified time periods. See OI 287.10j(3)(ii); OI 287.10o.

39/ Petitioner also relies on its current written policy -- outlined in its recently revised training manual, INS, U.S. Dept. of Justice, The Law of Arrest, Search, and Seizure for Immigration Officers at iv (Jan. 1983) -- of "erring on the conservative side when confronted with questionable search and seizure issues" by conforming its conduct to one or more lower court decisions (Pet. Br. 40-41). To be sure, these revised guidelines, which merely require INS agents to conform their behavior to current legal standards,

measuring the deterrent effect of the sanctions it might impose on its officers.

Adequate self-policing also depends in large part on the efficient reporting of complaints to INS by those citizens, residents, and undocumented aliens whose rights have been violated. The public remains inadequately informed of INS complaint procedures.^{40/} Without a realistic reporting structure or a system of incentives, few citizens or resident aliens

mark an improvement over earlier guidelines, which were severely criticized by courts as "sorely lacking in appropriate guidelines for agents" as well as being "misleading and inadequate." Illinois Migrant Council v. Pilliod, 398 F. Supp. 882,902 (N.D. Ill. 1975), aff'd, 540 F.2d 1062 (7th Cir. 1976), modified on rehearing en banc, 548 F.2d 715 (7th Cir.1977). Yet they can be effective only if enforced by imposing sanctions on officers for their violation, a process which does not appear to be taking place.

40/ U.S. Commission on Civil Rights, The Tarnished Golden Door, supra at 120 ("In spite of the importance of public awareness, no evidence was presented to the Commission of any formal INS program or systematic procedure to inform the public either of its right to file complaints or of the INS process and procedures for filing complaints.").

are likely to pursue such complaints by
INS ^{41/}

More importantly, however, INS is unable to point to a single case since the 1979 BIA decision in Matter of Sandoval where an INS officer was disciplined solely for engaging in an unlawful search or seizure, despite widespread acknowledgement that such violations have taken place.^{42/} INS's

41/ Few of those who are deported are likely to make such complaints.

42/ See discussion at pp. 90-100. In an attempt to show that "INS's disciplinary rules are not mere paper procedures," the best the government can produce is an INS report, specially requested for the government's brief, showing that "in the preceding four fiscal years, 20 officers have been suspended or terminated for misconduct affecting aliens." (Pet. Br. 45 n.28). Not one of these disciplinary cases, however, can be identified as involving Fourth Amendment violations. According to the report, 11 INS officers were terminated (or resigned prior to termination) for the following genuinely appalling misconduct: 3 for rapes of aliens; 3 for assaults on federal undercover officers posing as aliens; 2 (detention officers) for physically abusing and causing injury to detained aliens; 2 for physically abusing detainees; 1 for physically abusing a Mexican national applying for admission. The report contains no information regarding the circumstances underlying the 9 suspensions and 3 reprimands made

internal disciplinary procedures simply do not provide an adequate alternative to the exclusionary rule.^{43/}

over the last four years under the disciplinary procedures. Upon request, counsel for Petitioner provided us with a copy of the report, a memorandum dated February 17, 1984 from William J. Hannon, Program Analyst, to Walter P. Connery, Director, Office of Professional Responsibility regarding "Findings from Review of Substantiated Civil Rights Cases." (A copy of this memorandum has been lodged with the Court by Respondents.) Although we have asked for more information regarding the disciplinary actions involving suspensions and reprimands, counsel for Petitioner has informed us that it has no additional information regarding the disciplinary actions referenced in the memorandum.

43/ The government also erroneously argues that application of the exclusionary rule could have a chilling effect on the formulation of additional standards to govern INS investigative procedures, relying on United States v. Caceres, 440 U.S. 741 (1979). Reliance on Caceres is totally misplaced in this context. In Caceres, the Court held that exclusion of evidence would not be required by the failure of IRS to comply with its own regulations in obtaining the tape-recorded evidence where 1) IRS was not required by the Constitution or by statute to adopt any particular procedures or rules before engaging in consensual monitoring, and 2) none of the taxpayers' constitutional rights were violated. Here, by contrast, some kind of deterrent sanction is constitutionally required. E.g., United States v. Calandra, 414 U.S. at 348; Elkins v. United States, 364 U.S. at 217; Weeks v. United States, 232 U.S. at 393. Respondents seek enforcement of Fourth Amendment rights, not of an agency regulation. Moreover,

d. Finally, reliance on the INS practice of excluding evidence seized through intentionally or flagrantly unlawful conduct, under a Fifth Amendment due process rationale, merely reaffirms the compelling need for continued application of the rule in this context. Although better than nothing at all, such a due process rule is severely limited because it deters only the most "egregious" violations of Fourth Amendment rights, and has the additional disadvantage of failing to provide clear standards for determining when the suppression sanction should be applied.^{44/} In effect, it rewrites

application of the exclusionary rule in this context would tend to encourage, rather than chill, the formulation of additional internal procedures to ensure that officer conduct does not result in an unduly high rate of successful suppression motions.

44/ In the criminal context, the broad due process check on the conduct of law enforcement officers has been confined to the narrow category of cases in which the law enforcement officers have been brutal, employing against the defendant physical or psychological coercion that "shocks the conscience." See Irvine v. California, 347 U.S. 128, 132-133

the Fourth Amendment itself as it applies in the immigration context, protecting Hispanic Americans in general (and illegal aliens in particular) only from egregiously severe searches and seizures, and permitting unreasonable (but less severe) violations. Moreover, because the due process rule sanctions only deliberate constitutional violations, it may require inquiry into the subjective state of mind of the officer. It therefore does little to reduce the likelihood of violations "motivated by commendable zeal, not condemnable malice."^{45/} For those violations, a remedy is required to temper official enthusiasm in apprehending aliens with the need to comply with the dictates of the Fourth Amendment. Only the exclusionary rule provides a remedy adequate to safeguard these important values.

(1954); Rochin v. California, 342 U.S. 165, 172-174 (1952).

^{45/} See Stewart, supra, 83 Col.L.Rev. at 1389.

B. Application of the Exclusionary Rule Will Not Unduly Impede INS Enforcement Efforts, As Illustrated By the Past and Present Practice of Suppressing Tainted Evidence in Deportation Proceedings

Two flaws fatally undermine the government's argument that the "costs of suppression in the deportation context are higher than our immigration system can afford." (Pet. Br. 23). First, in assessing the societal costs of suppression, the government less than candidly ignores the past and present Board of Immigration Appeals practice of suppressing evidence obtained in violation of Fourth and Fifth Amendment rights, as well as evidence obtained in violation of certain INS regulations. Second, the government relies on recently supplied non-record "facts," which are patently untrustworthy and inaccurate, as the sole basis for its assertion that the decision below has resulted in an increase in suppression motions which would "deal a grave

blow to the enforcement of immigration laws." (Pet. Br. 31). These attempts to provide the missing factual underpinnings for its arguments must be rejected.

1. The Exclusionary Rule's Application In Deportation Proceedings

INS has long operated in an investigative and prosecutorial regime in which evidence obtained through an illegal search or seizure may be suppressed in deportation proceedings. In August, 1979, however, in sharp departure from its longstanding practice, the BIA ruled that the exclusionary rule does not bar the INS from using evidence obtained in violation of the Fourth Amendment. Matter of Sandoval, 17 I. & N. Dec. 70 (BIA 1979) (JA 163). In February 1980, only six months after announcing its decision in Matter of Sandoval, the BIA returned to a limited rule of exclusion for cases in which "the manner of seizing evidence is so egregious that to

rely on it would offend the fifth amendment due process requirement of fundamental fairness." Matter of Toro, 17 I. & N. Dec. 340, 343 (BIA 1980).

a. Administrative history. Prior to the BIA's decision in Sandoval, the INS and the BIA had "accepted and applied the [exclusionary] rule . . . for many years and in countless cases since the dictum in U.S. ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923), in which the Court assumed that "'evidence obtained . . . through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings.'" Matter of Sandoval, 17 I. & N. Dec. 70, 93 (Applemen, Bd. member, dissenting in part, concurring in part) (JA 194-95, 201). Accordingly, in pre-Sandoval cases, the BIA frequently reviewed rulings of immigration judges on motions to suppress evidence obtained in violation of the Fourth

Amendment.^{46/} In virtually all of the cases it reviewed, the BIA either found no illegality in the underlying arrest or detention^{47/} or concluded that there was

46/ E.g., Matter of Yau, 14 I. & N. Dec. 630,632 (BIA 1974) ("The law realistically recognizes that on occasion some overzealous Government officials may overreach and may themselves violate constitutionally protected rights in obtaining evidence of wrongdoing on the part of others. The rule excluding such evidence (the exclusionary rule) is founded on sound principles of policy laid down long ago.") (Maurice A. Roberts, Chairman, concurring at 641-42). Under well-established procedures, a motion to suppress evidence in deportation hearings must be based on an offer of proof or affidavit, based on personal knowledge, setting forth a prima facie case of the illegality of INS actions. Matter of Wong, 13 I.& N. Dec. 820 (BIA 1971) (no prima facie case of illegal search and seizure established and therefore INS need not justify manner in which it obtained the evidence); Matter of Tang, 13 I. & N. Dec. 691 (BIA 1971) (no prima facie case established); Matter of Tsang, 14 I.& N. Dec. 294,295 (BIA 1973) (rule concerning burden of proof for motions to suppress evidence "which is applied in criminal cases, has been adopted for use in deportation hearings").

47/ E.g., Matter of King and Yang, 16 I.& N. Dec. 502 (BIA 1978); Matter of Cachiguango and Torres, 16 I. & N. Dec. 205 (BIA 1977); Matter of Mejia, 16 I. & N. Dec. 6,8 (BIA 1976); Matter of Burgos, 15 I. & N. Dec. 278 (BIA 1975); Matter of Yau, 14 I. & N. Dec. 630 (BIA 1974); Matter of Scavo, 14 I. & N. Dec. 326 (BIA 1973); Matter of Methure, 13 I. & N. Dec. 522 (BIA 1970); Matter of Au, Yim, and Lam, 13 I. & N. Dec. 294 (BIA 1969), aff'd, sub nom., Au Yi Lau v. INS, 445

independent, untainted evidence of deportability sufficient to uphold the deportation order.^{48/}

F.2d 217 (D.C. Cir. 1971), cert. denied, 404 U.S. 864 (1971); Matter of Wong and Chan, 13 I. & N. Dec. 141 (BIA 1969), aff'd sub nom., Tit Tit Wong v. INS, 445 F.2d 217 (D.C. Cir. 1971), cert. denied, 404 U.S. 864 (1971); Matter of Doo, 13 I. & N. Dec. 30 (BIA 1968); Matter of Yam, 12 I. & N. Dec. 676 (BIA 1968), aff'd, Yam Sang Kwai v. INS, 411 F.2d 683, 690 (D.C. Cir. 1969), cert. denied, 396 U.S. 877 (1969) (Wright, J., dissenting) ("In my view the statement was the fruit of an [illegal] seizure . . . and should not have been admitted."); Matter of Chen, 12 I. & N. Dec. 603 (BIA 1968); see also Matter of D M, 6 I. & N. Dec. 726, 730 (BIA 1955) (exclusionary rule not applicable to local police, only to federal government).

48/ For example, in Matter of Perez-Lopez, 14 I. & N. Dec. 79 (BIA 1972), the immigration judge suppressed evidence obtained from an illegal search and seizure as the "fruit of the poisonous tree," and terminated the deportation proceedings. Later, the case was reopened based on an independent tip, and the resulting deportation order based on untainted evidence was upheld by the BIA, which explicitly rejected the notion that the prior application of the exclusionary rule resulted in an illegal alien achieving "what is tantamount to permanent residence merely because the service at one time may have acted illegally in assembling evidence of his deportability." Id. at 81.

We note that immigration decisions are reported only if decided by the BIA, and are generally available then only if designated for publication by the BIA. It is therefore likely that there are numerous unreported pre-Sandoval cases in which

Consistent with the above-described state of affairs, immigration law practitioners were informed by the major treatise in their field, authored by a former general counsel of INS, that "[i]t is undisputed . . . that the Fourth Amendment prohibition against unreasonable searches and seizures applies in deportation proceedings, and that evidence obtained as the result of

illegally obtained evidence was suppressed in an unappealed ruling by an immigration judge.

The BIA held in numerous other pre-Sandoval cases that the deportation orders were supported by sufficient untainted evidence, including admissions made at the deportation hearing, and therefore did not reach the question of the legality of the underlying search or seizure. See, e.g., Matter of Taerghodsi, 16 I. & N. Dec. 260 (BIA 1977), aff'd, Taerghodsi v. INS, 569 F.2d 1154 (5th Cir. 1978), cert. denied, 439 U.S. 829 (1978).; Matter of Castro, 16 I. & N. Dec. 81 (BIA 1976); Matter of Escobar, 16 I. & N. Dec. 52 (BIA 1976); Matter of Davila, 15 I. & N. Dec. 781 (BIA 1976); Matter of Bulos, 15 I. & N. Dec. 645 (BIA 1976); Matter of Rojas, 15 I. & N. Dec. 492 (BIA 1975); Matter of Cheung, 13 I. & N. Dec. 794 (BIA 1971); Matter of Methure, 13 I. & N. Dec. 522,526 (BIA 1970); Matter of Wong and Chan, 13 I. & N. Dec. 141 (BIA 1969), aff'd sub nom., Tit Tit Wong v. INS, 445 F.2d 217 (D.C. Cir. 1971), cert. denied, 404 U.S. 864 (1971); Matter of T, 9 I. & N. Dec. 646 (BIA 1962).

the unlawful search cannot be used."^{49/}

In 1979, the BIA held, for the first time, that the Fourth Amendment exclusionary rule does not apply to deportation proceedings.^{50/} In Matter of Sandoval, supra, (J.A 163), the BIA first concluded that INS agents had violated Emma Sandoval's Fourth Amendment rights by a warrantless, nonconsensual search of her residence at 6:00 a.m. during an area control operation in New Rochelle, New York. Despite the Fourth

^{49/} 1A C. Gordon and H. Rosenfield, Immigration Law and Procedure §5.2c at 5-31 (rev. ed. 1977). Accord, J. Wasserman, Immigration Law and Practice, Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, at 77 (October, 1961) ("In deportation proceedings aliens are protected against illegal searches and seizures and may suppress evidence procured illegally").

^{50/} Despite the long history of applying the exclusionary rule in deportation proceedings, the BIA addressed the question as one of first impression in Matter of Sandoval because it could "find no decision in which the appropriateness of applying the rule in deportation proceedings is analyzed in any detail." (JA 171).

Amendment violation, the BIA refused to exclude the fruit of the illegal search and seizure, her statement and the I-213, "Record of Deportable Alien," prepared in conjunction with it. The BIA held, in essence, that because deportation proceedings are civil in nature, the INS could benefit from its own illegal conduct by using evidence that would otherwise be suppressed in a criminal proceeding (JA 175-176).

Six months after its decision in Sandoval, however, the BIA suppressed evidence obtained as a result of an illegal search and seizure in In re Rosa Ramira-Cordova, A 21 095 059 (February 21, 1980).^{51/} The search in Cordova occurred as part of an INS nighttime residential area control operation. The BIA concluded that

51/ This decision was not designated by the BIA for publication. However, a copy of the decision was attached by INS as "addendum 3" to its brief filed in the court of appeals in Lopez's case.

"cases may arise [such as this one] in which the manner of seizing evidence is so egregious that to rely on it would offend the Fifth Amendment's due process requirement of fundamental fairness," id. at 4, and ordered the deportation proceeding terminated because the unlawfully obtained evidence was the only evidence of deportability.^{52/}

In addition to post-Sandoval suppression of evidence obtained through "egregious" violations of Fourth Amendment rights, the BIA excludes from deportation proceedings evidence obtained in violation of 1) Fifth

^{52/} See also Matter of Toro, 17 I. & N. Dec. 340,343 (BIA 1980) (BIA declined to suppress the evidence obtained as a result of an INS agent's Fourth Amendment violation where the agent was acting in accordance with INS policy prior to the Court's decision in United States v. Brignoni-Ponce, 422 U.S. 873 (1975)); In re Argentina Guevara-Benitez, A 22 552 166 (April 24, 1980) (remanding for further factual findings and a determination under Toro regarding "extremely serious" allegations that INS had illegally arrested Guevara based solely on her Latin appearance).

Amendment rights^{53/} and 2) certain INS regulations.^{54/}

In January 1981, Attorney General Civiletti declined to certify or reverse Matter of Sandoval pursuant to a request made under the provisions of 8 C.F.R. §3.1(h), which reserves to the Attorney General discretionary authority to review any BIA decision. Although he concluded that "the application of the exclusionary rule was not legally required," he announced a

53/ In Matter of Garcia, 17 I. & N. Dec. 319 (BIA 1980), the BIA excluded admissions made after the INS refused the alien's repeated requests to consult with a lawyer, held him incommunicado, and did not inform him of his right to a hearing. Because these involuntary admissions constituted the only evidence supporting deportability in that case, the deportation proceedings were terminated.

54/ In Matter of Garcia-Flores, 17 I. & N. Dec. 325,328 (BIA 1980), the BIA held that a violation of a regulatory requirement by an INS agent can result in evidence being excluded or proceedings invalidated where the regulation in question serves "a purpose of benefit to the alien" and the violation "prejudice[s] . . . interests [of the alien] that were protected by the regulation."

modification of internal policy with respect to violations of search and seizure law.^{55/} The Attorney General emphasized, however, that the new policy was not intended to "create or confer any private right enforceable at law or in equity against the United States or any agency or employee thereof."^{56/} Id. at p. 2.

55/ First, after noting the absence of a "consistent statement of the appropriate administrative discipline to be applied for search and seizure violations" the Attorney General outlined disciplinary measures for intentional, reckless, or negligent violations of law. Second, the Attorney General ordered the application of an internal rule for the most egregious violations of search and seizure law, in which the government will "voluntarily" exclude from any proceedings evidence which has been seized through intentionally unlawful conduct. See Memorandum of Jan. 16, 1981, from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus and Divisions, Violations of Search and Seizure Law.

56/ He thus retained the option to rely on illegally obtained evidence in deportation proceedings based on a review of the facts in each case, citing United States v. Caceres, 440 U.S. 741 (1979), where this Court declined to apply the exclusionary rule to evidence obtained in violation of agency regulations where the regulations were not required by the Constitution or by statute. Notwithstanding that retained discretion, it is plain that BIA must independently determine whether to admit the

b. Judicial history. Over sixty years ago, on the only occasion this Court has had to comment on the question raised by the instant case, it stated:

It may be assumed that evidence obtained by the [Labor] Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings. Compare Silverthorne Lumber Co. v. United States, 251 U.S. 385; Gouled v. United States, 255 U.S. 298.

United States ex rel. Bilokumsky v. Tod, 263 U.S. 149,155 (1923). There was no need to reach the issue of suppression of the evidence in Bilokumsky because the Court held that there was no unlawful search or seizure 57/

evidence. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

57/ The Court in Bilokumsky also rejected the argument that the evidence was obtained in violation of administrative rules because "no rule is shown which prohibits interrogation without apprising the person under investigation that he is entitled to refuse to answer and to have counsel." Id. at 155-156. Bilokumsky's admission of alienage was obtained by a federal immigration officer during an interrogation held in prison, where Bilokumsky was confined by city

The federal courts which have confronted the question have all held that evidence illegally obtained by federal agents may not be admitted in subsequent deportation hearings. See Lopez-Mendoza and Sandoval-Sanchez v. INS, 705 F.2d 1059; Wong Chung Che v. INS, 565 F.2d 166,169 (1st Cir. 1977) (ordering a remand for an evidentiary hearing on the motion to suppress evidence obtained through an illegal search and seizure, stating that if the alien crewman's landing permit was obtained through an illegal search "there is no authority of which we are aware that would make it admissible");^{58/} Ex parte

authorities on charges that he had violated the state sedition law.

58/ The government erroneously states that the court in Wong Chung Che "suggested . . . that it would not follow the same rule in the case of oral statements . . . , which are what is at issue in the present cases." (Pet. Br. 17 n.10) Presumably, the government relies on the court's observation that "[w]hile wide latitude is permitted the government in introducing statements of arrested suspects, whether or not they might be suppressed in a criminal proceeding, we can think of no justification for

Jackson, 263 F. 110,112-113 (D. Mont.),
appeal dismissed sub nom. Andrews v. Jackson,
267 F. 1022 (9th Cir. 1920) ("the deportation
proceedings [were] unfair and invalid, in
that they [were] based upon evidence and
procedure that violate the search and seizure
and due process clauses of the
Constitution"); United States v. Wong Quong
Wong, 94 F. 832,834 (D. Vt. 1899) (the
"constitutional safeguards [of the Fourth
Amendment] would be deprived of a large part
of their value if they could be invoked only

encouraging the illegal searches of premises." 565
F.2d at 169. The court refers there to a line of
cases which have held that statements obtained without
full Miranda warnings, which would render them
inadmissible in a criminal proceeding, may under
certain circumstances be admitted in deportation
proceedings. Id. at 168. See, e.g., Chavez-Raya v.
INS, 519 F.2d 397 (7th Cir. 1975); Trias-Hernandez v.
INS, 528 F.2d 366,368 (9th Cir. 1975); see also Navia-
Duran v. INS, 568 F.2d 803 (1st Cir. 1977) (statement
must be voluntarily given). Those considerations are,
of course, distinguishable from the settled principle
that statements as well as physical evidence may be
suppressed as the product of a Fourth Amendment
violation. See Brown v. Illinois, 422 U.S. 590
(1975).

for preventing the obtaining of such evidence, and not for protection against its use.") Other courts have either expressly or implicitly assumed that the rule applies in their discussions of underlying Fourth Amendment issues.^{59/} Throughout the last century, not a single federal court has concluded that evidence tainted by an illegal search or seizure is admissible in

59/ E.g., Huerta-Cabrera v. INS, 466 F.2d 759,761 n.5 (7th Cir. 1972); Yam Sang Kwai v. INS, 411 F.2d 683,690 (D.C.Cir.1969), cert. denied, 396 U.S. 877 (1969) (Wright, J., dissenting) ("In my view the statement was the fruit of an [illegal] seizure . . . and should not have been admitted."); Klissas v. INS, 361 F.2d 529 (D.C. Cir. 1966); Vlissidis v. Anadell, 262 F.2d 398,400 (7th Cir. 1959); Schenck ex rel. Chow Fook Hong v. Ward, 24 F. Supp. 776,778 (D. Mass. 1938) (Writ of habeas corpus denied where contested evidence obtained in search of another detained alien; the court observed in dictum, however, that if evidence had been obtained in violation of his rights, it would not be admissible against him in criminal or civil proceedings).

More recently, courts have viewed the issue as an open question, but have not reached the issue because of underlying Fourth Amendment holdings that the evidence was lawfully obtained, e.g., Babula v. INS, 665 F.2d 293,301 n.4 (3d Cir. 1981) (Adams, J., concurring); Carnejo-Molina v. INS, 649 F.2d 1145,1149 n.3 (5th Cir. 1981).

deportation proceedings.

2. The Practical Effect of Suppression
Motions on Current INS Enforcement

Contrary to the government's assertions, applying the exclusionary rule in deportation proceedings will not unduly impede INS enforcement of immigration laws. When the "costs" assigned to the rule by the government are examined in light of the above described history, they pose neither an excessive nor unmanageable price to pay for the preservation of Fourth Amendment rights.

The government first points to the cost of permitting an illegal alien to go free, labelling it a "de facto judicial grant of resident status and immunity from the immigration laws." (Pet. Br. 24). But application of the exclusionary rule does not result in a grant of immunity from deportation. At any time, INS may proceed in deportation proceedings with untainted

evidence, even in the same proceeding.^{60/} As the pre-Sandoval administrative history establishes, INS has frequently been able to sustain its burden of showing that other evidence of deportability remains untainted by the official misconduct.^{61/}

Moreover, even where independent INS records or other untainted evidence are not immediately available, aliens who entered

60/ This Court has declined to adopt a "per se" or "but for" rule that would make inadmissible any evidence which comes to light through a chain of causation that began with an illegal arrest. Brown v. Illinois, 422. U.S. at 603 (1975) ("The workings of the human mind are too complex and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test"). See also United States v. Ceccolini, 435 U.S. 268 (1978).

61/ See discussion and cases cited, supra, at p.68 n.48; see also, e.g., Carnejo-Molina v. INS, 649 F.2d at 1148-1149 (5th Cir. 1981); Babula v. INS, 665 F.2d at 301-303 (3d Cir.1981) (Adams, J., concurring); Katris v. INS, 562 F.2d 866, 868-869 (2d Cir. 1977); Medina Sandoval v. INS, 524 F.2d 658 (9th Cir. 1975); Huerta-Cabrera v. INS, 466 F.2d 759 (7th Cir. 1972); See generally 1A Gordon and Rosenfield, Immigration Law & Procedure, §5.2b, at 5-25, §5.10a at 116-117 (March 1983 Supp).

without inspection may be apprehended and deported through the use of untainted evidence, just as are other members of this "shadow population."^{62/} INS receives tips from informants who are ex-spouses, landlords, neighbors or co-workers, and uses this information to apprehend undocumented aliens. The fact that the undocumented alien was previously unlawfully arrested does not taint any subsequent proceeding.

Even if some few illegal aliens go free, and are not apprehended and deported through independent evidence, the costs of their release are not excessive. Most fundamentally, the "cost" is in fact simply the cost already mandated by the Fourth Amendment itself, which would have rendered the evidence (or the alien) unavailable had the INS complied with its familiar

62/ See Plyler v. Doe, 457 U.S. 202, 218 (1982).

requirements.^{63/} In any event, the number of aliens freed by application of the rule has in the past been statistically insignificant (Pet. App. 30a). Moreover, the cost to society of releasing an individual undocumented alien is significantly less than releasing, without punishment, a criminal who preys on individuals or society.^{64/} The

63/ See Stewart, supra, 83 Col. L. Rev. at 1392-1393.

64/ The few aliens who may go free and remain in this country as a result of the application of the exclusionary rule pose no collective economic threat to society, regardless of the positive or negative impact of the entire class of illegal aliens on the economy. The impact of the entire class of illegal aliens in the country has been a subject of considerable dispute. See, e.g., Developments in the Law: Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286, 1441-43 (1983); see also Plyler v. Doe, 457 U.S. 202,228 (1982). That debate, we agree, is one for Congress to resolve. It should be noted, however, that current legislative proposals, if enacted, would legalize the status of a large proportion of undocumented aliens in the United States. See S. 529, Section 301(a) adopted by the Senate on May 18, 1983; H.R. 1510, reported by the Committee on the Judiciary of the House of Representatives on May 5, 1983. Both the Attorney General and the Commissioner of Immigration and Naturalization have testified in favor of legalization provisions. See H.R. Rep. No. 98-115 at 87-88 (quoting testimony of Attorney General William French

government's suggestion (Pet. Br. 10) that the "licensing of continuing unlawful conduct is unparalleled in our jurisprudence," and unlike granting immunity for past criminal conduct, "offend[s] society's notions of justice and judicial integrity," stands the concept of "judicial integrity" on its head. The same rationale would condemn both the long-standing requirement of suppressing evidence obtained in violation of Fifth Amendment rights and the BIA's post-Sandoval due process rule of suppressing evidence obtained through egregious violations of the Fourth Amendment. Thus, if exclusion in fact constitutes a cost at all, it is a cost that

Smith in support of the legalization provision of H.R. 1510.) Thus, in another context, the government has taken a contradictory position with regard to whether illegal aliens harm our economy. (See Pet. Br. 10,24). The BIA itself conceded in Matter of Sandoval, 17 I.& N. Dec. at 80, that application of "the rule would not appear to have the potential to significantly impact on this country's immigration laws and policies." (JA 177).

the immigration system already bears under other constitutional requirements.^{65/}

Recognizing that the substantive cost of exclusion is de minimis, the government relies instead largely on speculative damage to the immigration litigation system which may result from merely allowing suppression

65/ Contrary to the government's assertion, suppressing tainted evidence in deportation proceedings is simply not akin to suppression of an alien's "body." As in the criminal context, an illegal arrest does not invalidate subsequent judicial proceedings. E.g., United States ex rel. Bilokumsky v. Tod, 263 U.S. at 158; Katris v. INS, 562 F.2d 866, 869 (2d Cir. 1977); Medina-Sandoval v. INS, 524 F.2d 658 (9th Cir. 1975).

The proceeding may be terminated without a deportation order, however, when the government fails to sustain its burden of proof. Because the government seeks to expel the alien from the country, the burden is on INS to prove deportability, see Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963), by "clear, unequivocal, and convincing evidence." Woodby v. INS, 385 U.S. 276 (1966). Only when the government sustains its burden of establishing alienage does the alien have the burden of proving time, place, and manner of entry. 8 U.S.C. §1361; See Corona-Palomera v. INS, 661 F.2d 814, 816 (9th Cir. 1981); Iran v. INS, 656 F.2d 469, 470 n.5 (9th Cir. 1981); see also Navia-Duran v. INS, 568 F.2d 803, 811 (1st Cir. 1977) (burden on INS to show that subject of deportation proceeding is a deportable alien).

motions to be brought. The government emphasizes the summary nature of most deportation proceedings and argues that any significant intrusion of complex constitutional questions will "overload the system to the point of breakdown." (Pet. Br. 28).

Contrary to the government's assumption, however, refusal to apply the Fourth Amendment exclusionary rule will not eliminate suppression motions from the deportation process. An alien who has succeeded in entering the country possesses a right to a hearing on the issue of deportability which must comport with Fifth Amendment guarantees of due process.^{66/} As outlined above, the BIA presently permits inquiry into allegations of egregious Fourth

^{66/} See, e.g., Bridges v. Wixon, 326 U.S. at 154 (1945); Kaoru Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903); Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part and dissenting in part).

Amendment violations and excludes evidence where circumstances surrounding an arrest or interrogation would render admission "fundamentally unfair." In addition, the BIA permits inquiry into the voluntariness of admissions and excludes statements which are involuntarily given.^{67/} The BIA also excludes evidence obtained in violation of certain regulatory requirements. Elimination of Fourth Amendment suppression motions has not and cannot significantly reduce the burdens and delays the system already faces and has coped with in the past.

Furthermore, present BIA procedures for suppression motions address many of the concerns raised by the government. Contrary to the government's assertions, the agent's actions are presumed to be in accordance with

^{67/} See discussion and cases cited supra, at pp.72-73; see also, e.g., Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); Bong Youn Choy v. Barber, 279 F.2d 642 (9th Cir. 1960).

the law unless the subject of the deportation hearings makes an initial showing of illegality.^{68/} Only after a prima facie case of illegality is made does the burden shift to the government to show that the evidence was not obtained illegally, or that the connection between the lawless conduct and the discovery of the challenged evidence has become, under Wong Sun v. United States, 371 U.S. 471, 487 (1963), "so attenuated as to dissipate the taint." The government's fears that frivolous or dilatory suppression motions will divert the resources of the agency by requiring the presence of INS officers at hearings or necessitating a modification in record-keeping are accordingly groundless.^{69/}

^{68/} See discussion and cases cited at note 46, supra.

^{69/} If the INS were concerned about preparing an adequate response to nonfrivolous motions, it could easily require that suppression motions and supporting affidavits be filed prior to the hearing. Cf. 8 C.F.R. §287.4(a)(2) (procedures for obtaining subpoenas); 8 C.F.R. §242.16 (deportation hearing procedures).

In a last ditch attempt to establish that the court's decision below has resulted in a "dramatic increase" in suppression motions, the government relies on non-record figures assembled by INS for the purposes of Petitioner's Brief (Pet. Br. 29-30).

Although acknowledging that the numbers supplied by INS represent "estimates" because INS did not keep count of such motions prior to January 16, 1984, the government fails to reveal the baseless nature of its "statistics." For cases which were not appealed to the BIA and were closed prior to 1984, records are generally not available.^{70/} Almost unbelievably, in light of this Court's settled practice of limiting

^{70/} Counsel for Petitioner has informed us that deportation hearings and decisions of immigration judges are not transcribed unless a BIA appeal is filed; untranscribed tapes are reused for other hearings. INS closed case files are often transferred to other offices, and no central depository of deportation case files exists which would permit an accurate review of closed files.

its consideration to facts properly grounded in the record, the government relies on facts (the number of suppression motions) which it told INS trial attorneys to reconstruct from memory.^{71/} The dimming of memories with the passage of time, staff turnover, and transfer of case files -- to say nothing of the obviously interested nature of this "research" --make comparison with the figures for the years before and after the decision impossible. At most, the only reliable conclusion that can be drawn is that some number of suppression motions were filed during the post-Matter of Sandoval period before and after the Ninth Circuit's decision, further demonstrating that the

71/ The INS method of reconstructing these figures by memory was explained to us only in response to our request, upon receipt of the typescript copy of Petitioner's brief, that similar data be assembled for the pre-Sandoval years 1977 and 1978. Counsel for Petitioner declined to do so, informing us that it would be impossible to reconstruct the information for the reasons outlined above.

Sandoval decision of 1979 did not eliminate the filing of suppression motions in deportation proceedings. Abandonment of the rule has not and will not result in the elimination of such motions, and cannot therefore appreciably change the nature of deportation hearings.

C. The Social Costs Of Abandoning The Rule Are Excessive, Leading To Wholesale Violations Of The Fourth Amendment Rights Of Discrete Racial And Ethnic Minorities.

The unrestrained exercise of federal authority in enforcing immigration laws infringes the rights of those most vulnerable to INS abuses, members of the same racial or ethnic communities where the targets of INS enforcement actions -- illegal aliens -- live and work. The broad Congressional power to decide which aliens to admit, and to subject those admitted to questioning concerning

their right to be and remain in this country, "cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." United States v. Brignoni-Ponce, 422 U.S. at 884. Unless INS officers are effectively checked by the Fourth Amendment, however, immigration law enforcement pressures inevitably lead to violations of the constitutional rights of law abiding citizens and permanent residents, as well as those of undocumented aliens.

During the last several decades, Latin America and Asia have supplanted Europe as the major source of immigrants to the United States, and for more than twenty years, Mexico has been the country which has supplied the largest number of legal immi-

grants.^{72/} That pattern has also been reflected in illegal immigration. The 1980 census counted approximately 2 million illegal aliens, of which 63.6% were from countries in Latin America, including Mexico.^{73/} In contrast, the 1980 census counted a total of 14.6 million persons of Hispanic ancestry in the United States.^{74/} INS enforcement actions have increasingly focused on apprehending illegal Mexican immigrants. Mexicans comprised 93%

^{72/} Passel and Warren, Estimates of Illegal Aliens from Mexico Counted in the 1980 United States Census, U.S. Bureau of the Census, Washington, D.C. (1983) at p. 1.

^{73/} Id at pp. 8-9. Of the 2 million illegal aliens counted in the 1980 census, 931,000 (or 45.5%) were from Mexico. Id. Current data suggests that the number of illegal Mexicans in the United States "is substantially less than many of the earlier conjectural estimates, with a realistic upper bound of no more than 4 million and with the probable total number being even less." Id. at 2.

^{74/} U.S. Census Bureau, Publication PC 80-1-B1 General Population Characteristics, United States Summary, Table 39 at 1-2 (May 1983).

of all deportable aliens apprehended in 1979.^{75/} Although the overwhelming majority of illegal aliens seized are found as a result of border operations, the INS also conducts "area control operations," factory and neighborhood raids designed to apprehend aliens who are presently residing within the United States in violation of immigration laws.^{76/}

In the course of both its border operations and area control operations, INS inevitably encounters numerous citizens and lawful residents of Mexican or Hispanic ancestry. Even in border states, a relatively small proportion of persons of

75/ INS, 1979 Annual Report at 3.

76/ According to INS, in 1979, border patrol agents located 888,729 deportable aliens. Of that total, border patrol agents in the Chula Vista sector alone located 337,930 or over 31% of the deportable aliens apprehended for the year. In contrast, area control investigators located a total of 187,689 deportable aliens nationwide, of whom 100,087 or 53% were employed. Id. at 3,5.

Mexican or Hispanic ancestry are aliens.^{77/} According to the 1980 census, in California, approximately 70% of the state's Hispanic population are citizens.^{78/} In Texas, 88% of the total Hispanic population are citizens,^{79/} and in Washington, where Respondent Sandoval was apprehended, 85% of the Hispanic population of the state are

77/ See U.S. v. Brignoni-Ponce, 422 U.S. at 886 n.12. According to the 1980 census, about 1.2 million registered legal resident aliens are from Mexico, and about 201,000 naturalized citizens are originally from Mexico. See Passel and Warren, supra, at 5,7-8.

78/ Of the total population of 23.6 million persons in California, 4.5 million are of Hispanic ancestry, and 1.3 million of that number are non-citizens. See 1980 Census of the Population, Vol. 1, Characteristics of the Population, Ch. D, Detailed Population Characteristics, Part 6, California, Section 1, Table 194. According to INS figures, there were 513,086 registered aliens from Mexico in California in 1979. INS, 1979 Annual Report at 18.

79/ Of the total population of 14.2 million persons residing in Texas, 2.98 million are of Hispanic ancestry, of that number, approximately 370,000 are non-citizens. Id. at Part 45, Texas, Section 1, Table 194. According to INS figures, there were 291,193 registered aliens from Mexico in Texas in 1979. INS, 1979 Annual Report at 18.

citizens.^{80/} Because large numbers of native-born and naturalized citizens have the physical and linguistic characteristics identified with Mexican or other Latin American ancestry, they may easily be, and frequently are, mistaken for aliens.

These citizens are already, at a minimum, subjected to a heightened degree of suspicion and scrutiny by INS officers, solely because of their race. The role which racial and ethnic appearance inevitably plays in INS officers' enforcement decisions adds significant equal protection overtones to what is essentially a Fourth Amendment problem. As cautioned in Marquez v. Kiley, 436 F. Supp. at 113-114,

. . . The spectre of INS

^{80/} Of the total population of 4.1 million persons residing in Washington, 121,286 are of Hispanic ancestry, and 17,212 are non-citizens. Id. at Part 49, Washington, Section 1, Table 194. According to INS, there were 5,156 registered aliens from Mexico in Washington in 1979. INS, 1979 Annual Report at 18.

investigators cruising through neighborhoods where large numbers of foreign-born people are known to reside and work in search of people who 'look like' aliens, engaging many, if not most, in detentive stops and transporting to INS headquarters those who cannot provide on-the-spot documentation of various personal circumstances, is fundamentally offensive to this nation's historical concepts of proper law enforcement techniques."

If, in addition, the deterrent sanction of the exclusionary rule is abandoned, the careful balancing of Fourth Amendment protections and law enforcement needs which have been structured by the Court will be lost. Hispanic Americans will be relegated to separate conditions of existence, with significantly less privacy and security than other Americans, solely because of their racial or ethnic identity with the primary targets of INS enforcement.

On a day-to-day level, that means that if Mexican Americans forget to carry identification the day of an INS sweep of

their neighborhood or workplace, or speak English poorly, they may suddenly find themselves locked up in INS detention facilities^{81/} or mistakenly sent to another country^{82/}. Even if they do carry

81/ See generally, e.g., Crewdson, J., The Tarnished Door, supra n.34, at 212-213, 226-227 (when a school board member in Southern California was accosted by an INS agent while walking near her home, she protested that she was not only a citizen, but also an elected official; the agent told her, "You Mexicans are all a bunch of liars" and threw her into his cruiser.); "Roundup of Aliens Meeting Problems", New York Times, Friday, April 30, 1982, A:10:1 (Maria Esther Aguayo, a 21 year old naturalized citizen who lives in Colorado said she and a friend who had permanent resident status were arrested in a raid in a nightclub. She said: "I kept telling them, 'I'm an American citizen; but they just laughed at me and said, 'You're going home. You're a wetback and you're going home.'")

82/ See generally, e.g., Crewdson, J., The Tarnished Door, supra, at 170, 212-214 (American citizen, born in Puerto Rico, was sent to Guatemala when when INS decided his accent was Guatemalan and his papers must be forged. In Guatemala, without money or a passport, he soon found himself in jail); "Baby, Deported by U.S., Is Being Returned," New York Times, Sunday, November 14, 1982, A:28:6 (U.S. citizen baby deported to Mexico in raid by INS). See also "Teen-Ager Deported By Mistake Is Found," New York Times, Tuesday, February 21, 1984 at p. A:16:5 (15 year old resident alien from Santa Ana found after being sent to Tijuana by INS).

documentation of citizenship, they may not be believed. For example, in dragnet sweeps of certain neighborhood bars in El Paso, Texas, carried out in early 1982, the INS arrested and detained an American citizen who produced valid documents establishing his citizenship; the interrogating INS officer discredited their authenticity because he spoke no English.^{83/} Cases like these and others demonstrate that law-abiding Americans of Hispanic descent are now, and will be in the

^{83/} See Mendoza v. INS, 559 F. Supp. 842, 845 (W.D. Tex. 1982). As found by the district court, the sweeps were conducted in an area frequented mainly by persons of Mexican descent and carried out in the following manner:

At each establishment, several INS agents, accompanied by several [city police] officers, burst unannounced, without warrant and without valid consent, into the bars, stopped the music, guarded the doors so that it was apparent to those inside the bar that no one could leave without permission of the officers, stopped bar service, made the patrons be seated or line up against the wall, randomly interrogated both patrons and employees in the bars as to their citizenship, concentrated on those of obvious Mexican descent, and searched other (sometimes private) areas of the establishments.

future, subjected to arbitrary and offensive intrusions by officials who suspect them of being undocumented aliens.^{84/}

Given the long history of applying a rule of exclusion in deportation proceedings, and the substantial enforcement duties now faced by INS, abandonment of the rule at this time, without the existence of equally effective alternatives, would inevitably lead to an "open season" on Hispanic Americans, resulting in the wholesale violation of Fourth Amendment rights based on racial or ethnic appearance. As this Court cautioned in Almeida-Sanchez v. United States, 413 U.S. 266,273 (1973), "[i]t is precisely the

^{84/} See generally U.S. Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration (1980) at 82-94, 94 (complaints of violations of citizens rights by INS examined and finding made that INS area control operations sometimes utilize ethnic appearance alone as basis for interrogation, and that such procedures "can and do in some instances result in persons, including U.S. citizens and residents, being subjected to unconstitutional searches and seizures."); see also cases cited at notes 9,28, supra.

predictability of [the pressures of enforcing immigration laws] that counsels a resolute loyalty to constitutional safeguards."

II. INS VIOLATED THE FOURTH AMENDMENT IN THIS CASE

The court of appeals correctly ruled below that 1) Respondent Sandoval's detention at the police station violated the Fourth Amendment because it constituted an arrest not based on probable cause, and 2) the admissions he made there were a product of the illegal arrest. Because no factual findings were made by the immigration judge regarding the Fourth Amendment issues raised in Respondent Lopez's case, the court below properly remanded the case for further administrative proceedings consistent with its decision in Sandoval's case.

INS did not seek review of the underlying Fourth Amendment ruling in these cases (Pet. at i, 20n.14). In view of that

decision, the government waived its right to challenge that ruling here.^{85/} Accordingly, the government may not now be heard to complain that "[a]pplication of the exclusionary rule to a case like [the present one] . . . is not likely to 'deter' official misconduct, since it appears that none in fact occurred" (Pet. Br. 34-35). As this Court observed in United States v. Janis, 428 U.S. at 443, "the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation."^{86/}

Nevertheless, in light of the government's argument, we address here the substantial Fourth Amendment violation in

85/ Cf. Blum v. Stenson, -- U.S. --, No. 81-1374, slip. op. at 4 n.5 (March 21, 1984) (failure to raise claim below bars its consideration here).

86/ See Illinois v. Gates, --- U.S. ---, 76 L.Ed.2d 527, 539 (1983) (declining to address applicability of rule where substantive Fourth Amendment issues are dispositive).

this case. In Sandoval's case (see pp. 1-7, supra), an INS agent pulled him out of line when he was in the process of entering his workplace, locked him in a men's restroom, and transported him to a police station for interrogation. INS attempted to deport him based on the statements he made to agents while detained at the police station. His custodial questioning was supported by nothing other than 1) the presumption that he reacted in a "furtive" manner in the presence of officials (i.e. avoiding eye contact, not responding to questions in English such as "Make a lot of money here?", or looking "dumb") and 2) his "foreign appearance." Regardless of when the INS agents placed him under arrest, there can be no doubt that Sandoval was "seized" within the meaning of the Fourth Amendment when he was locked in the men's restroom and then involuntarily transported to the police station. Dunaway

v. New York, 442 U.S. 200, 216 (1979); Brown v. Illinois, 422 U.S. at 605; Davis v. Mississippi, 394 U.S. at 726-727. Whether or not factors such as foreign appearance and failure to respond to questions in English may justify a brief investigatory detention, an issue not raised by these facts,^{87/} they certainly do not amount to probable cause for arrest.^{88/} Because the statements made by

^{87/} See International Ladies Garment Workers' Union v. Sureck, 681 F.2d 624, cert. granted sub nom. INS v. Delgado, No. 82-1271 (argued January 11, 1984). The Court has applied a "reasonable suspicion" standard to narrow categories of cases in which the nature of the intrusion is much more limited. In Brignoni-Ponce, for example, the Court applied the analysis outlined in Terry v. Ohio, 392 U.S. 1 (1968), to roving border patrol stops of automobiles to check for illegal aliens. However, those investigative stops usually lasted less than a minute and involved a brief question or two. The Court cautioned that "any further detention or search must be based on consent or probable cause." United States v. Brignoni-Ponce, 422 U.S. at 881-882; Accord, United States v. Martinez-Fuerte, 428 U.S. at 567 (fixed checkpoint); see also Benitez-Mendez v. INS, 707 F.2d 1107 (9th Cir. 1983). Here that standard was not met.

^{88/} Arrests under the immigration laws have long been held to require probable cause. See, e.g., Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971); La Franca v. INS, 413 F.2d 686 (2d

Sandoval during the illegal detention were, under Brown v. Illinois, supra, "obtained by exploitation and illegal arrest," they therefore were tainted by the agent's illegal conduct, and subject to suppression.^{89/}

In Respondent Lopez's case, the government correctly notes that the Fourth Amendment issue has not yet been determined,

Cir. 1969); Yam Sang Kwai v. INS, 411 F.2d 683 (D.C. Cir.), cert. denied, 396 U.S. 877 (1969). Probable cause exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person's belief that an offense has been or is being committed. See Cabral-Avila v. INS, 589 F.2d 957 (9th Cir. 1978), cert. denied, 440 U.S. 920 (1979).

89/ Although the government contends that the "record in Sandoval's case, fairly read, reveals that the only aliens transported to the police station were those who admitted their unlawful alienage at the plant" (Pet. Br. 35), the en banc panel of the court of appeals concluded otherwise, and for good reason. See Statement of the Case, supra at 2-4. Officer Bower merely testified that "a lot" of those initially detained for further questioning were questioned at the plant prior to transporting them to the police station for further processing (JA 140). He could not recall questioning Respondent Sandoval prior to his interrogation at the police station. (JA at 135-38, 140).

but erroneously maintains that "the administrative record seems quite adequate to demonstrate that an admission of alienage was made during a non-seizure encounter, and accordingly that there was no violation of Lopez's Fourth Amendment rights." (Pet. Br. 34). Respondent Lopez made three arguments below, each of which requires further factual findings: 1) that the agents' concededly unconstitutional warrantless and nonconsensual entry of Lopez's workplace violated his Fourth Amendment rights because he had a legitimate expectation of privacy in his workplace;^{90/} 2) that the agents had his

^{90/} The government argued for the first time in the court of appeals that Lopez lacked "standing" to challenge the legality of the agents' warrantless search of his workplace under Rakas v. Illinois, 439 U.S. 128, 140 (1978). Although the BIA's 1979 decision in Lopez's case was issued over ten months after Rakas, the government made no attempt to brief the issue there. INS therefore waived its right to raise that issue in the court of appeals under Steagald v. United States, 451 U.S. 204, 208-11 (1981). In any event, whether an individual has a legitimate expectation of privacy in the location subject to government intrusion turns on the particular facts of

name prior to entering the shop and, because there were no exigent circumstances, should have obtained a warrant for his arrest prior to their entry;^{91/} and 3) that even under the government's version of the facts, the initial investigatory stop for questioning was not supported by reasonable suspicion of illegal alienage and was therefore unlawful.^{92/} The government's argument

each case. Rakas, supra, 439 U.S. at 148-49. The answer here depends on a variety of factors, including whether Lopez was legitimately on the premises, whether he took precautions to protect his privacy, whether he used the location in a way which implied a subjective expectations of privacy, whether he had a right to exclude others, and the societal and historical expectation of privacy under the circumstances. Id. at 150-153 (Powell, J., concurring). Since there was no factual hearing on these issues below, the court of appeals appropriately remanded the case for further findings and a resolution of these issues by the BIA.

91/ The statutory authority for INS agents to make warrantless arrests, 8 U.S.C. § 1357(a)(2), presupposes that warrants are required unless there is insufficient time in which to obtain one.

92/ Even if the INS agents' testimony were uncontroverted, they did not have a reasonable suspicion based on "specific articulable facts" prior to questioning to believe Respondent Lopez was an

addresses only one of the grounds for Lopez's suppression motion--the illegal detention issue--and presupposes factual findings supporting its version of events.

Determination of the other two grounds for suppression also require factual findings addressing the issues of Lopez's expectation of privacy on the premises, and his offer of proof regarding the illegality of his warrantless arrest.

A remand for further proceedings was therefore the only appropriate action in Lopez's case, unless the court had been willing to resolve the disputed facts in Lopez's favor because he was not allowed to make a complete record below. Cf. Blum v. Stenson, supra.

In sum, as found by the court of

illegal alien. The underlying legal standard applied to the disputed facts is before the Court this term in INS v. Delgado, supra.

appeals, the underlying Fourth Amendment violation in this case involves at worst a flagrant disregard of probable cause requirements, and at best a reckless failure by INS to follow a plan embodying explicit neutral limitations on the conduct of individual officers. See Brown v. Texas, 443 U.S. at 51; Delaware v. Prouse, 440 U.S. 648 (1979). Under either view, the danger posed by such a violation -- especially if, undeterred by the exclusionary rule, it frequently recurs -- is that law-abiding persons with physical characteristics of those of Mexican ancestry, for that reason alone, will have their privacy and security intruded upon at the unbridled discretion of INS officers.

CONCLUSION

The judgments of the court of appeals
should be affirmed.

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